82-1565

No.

In the Supreme Court

OF THE

United States

October Term, 1982

Bacchus Imports, Ltd., and Eagle Distributors, Inc.,
Appellants,

vs.

George Freitas,
Director of Taxation of the State of Hawaii,
Appellee.

On Appeal from the Supreme Court of the State of Hawaii

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a state tax of 20% ad valorem on the sale at wholesale of all liquor sold in Hawaii, which singles out (by exemptions for locally produced liquors) imported liquor for discriminatory taxation, constitute a duty or impost on imports prohibited by the Import-Export Clause (U.S. Const., Art. I, § 10, cl 2)?

2. Does such a discriminatory state tax, imposed for the express purpose of fostering and protecting certain local liquor industries, infringe unconstitutionally on the power of Congress under the Commerce Clause (U.S. Const., Art. I, § 8, cl 3)?

3. Does such a discriminatory state tax, by exempting from the tax certain locally made liquors while taxing similar liquors imported into Hawaii by appellant wholesalers, deny to them the equal protection of the laws (U.S. Const., Am. XIV, § 1)?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Hawaii Tax Appeal Court and in the Hawaii Supreme Court were Bacchus Imports, Ltd. (Case No. 1852 in the Tax Appeal Court), Paradise Beverages, Inc. (Case No. 1862), Eagle Distributors, Inc. (Case No. 1866), and Foremost-McKesson, Inc., dba McKesson Wine & Spirits Co. (Case No. 1867), and George Freitas, Director of Taxation of the State of Hawaii (defendant in all cases). In the Hawaii Supreme Court all of these cases were consolidated as No. 7802, October Term 1979.

DESIGNATION OF CORPORATE RELATIONSHIPS

Bacchus Imports, Ltd., and Eagle Distributors, Inc. filing this Jurisdictional Statement jointly as Appellants in this proceeding, state that:

This is their original Designation of Corporate Relationships.

Bacchus Imports, Ltd., at the time of commencement of this action, was an independent Hawaii corporation, and is now a wholly-owned subsidiary of Eagle Distributors, Inc. Eagle Distributors, Inc. is not owned by any parent corporation, and does not have an ownership interest in any subsidiaries which are not wholly owned subsidiaries.

Eagle Distributors, Inc. does not have any affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Hawaii Supreme Court (App. A, *infra,* A-1) is reported in 65 Haw. ......, 656 P.2d 724 (1982). The opinion of the Hawaii Tax Appeal Court (App. B, *infra,* A-41) has not been reported.

JURISDICTION

The judgment of the Hawaii Supreme Court (App. C, *infra,* A-56), which sustained the validity of the Hawaii liquor tax (H.R.S. § 244-4, set out at p. 2 *infra*) against

a challenge based on the United States Constitution (Art. I, § 8, cl 3; § 10, cl 2; and Amendment XIV, § 1), was entered on January 5, 1983. The notice of appeal (App. D, *infra*, A-59) was filed with the Hawaii Supreme Court on March 3, 1983. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10, Clause 2 of the United States Constitution provides in part: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . ."

Section 8, Clause 3 of the same Article provides in part: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ."

Section 1 of the Fourteenth Amendment provides in part: ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Section 244-4 of the Hawaii Revised Statutes, as amended to date, provides:

> Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal

to twenty percent of the wholesale price of the liquor so sold or used; provided, that the tax shall be paid only once upon the same liquor; provided, further, that the tax shall not apply to:

(1) Liquor held for sale by a permittee but not yet sold;

(2) Liquor sold by one permittee to another permittee;

(3) Liquor which is neither delivered in the State nor to be used in the State, or which under the Constitution and laws of the United States cannot be legally subjected to the tax imposed by this chapter so long as and to the extent to which the State is without power to impose the tax;

(4) Liquor sold for sacramental purposes or the use of liquor for sacramental purposes, or any liquor imported pursuant to section 281-33;

(5) Alcohol sold pursuant to section 281-37 to a person holding a purchase permit or prescription therefor, or any sale or use of alcohol, so purchased, for other than beverage purposes;

(6) Okolehao manufactured in the State for the period May 17, 1971 to June 30, 1981;

(7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981; or

(8) Rum manufactured in the State for the period May 17, 1981 to June 30, 1986.

STATEMENT OF THE CASE

The central question presented by this appeal is in one sense as old as the Constitution itself: may a State use its power to tax so as to foster and protect local industries

at the expense of foreign commerce?[1] The material facts are not in dispute.

Appellants Bacchus Imports, Ltd. ("Bacchus") and Eagle Distributors, Inc. ("Eagle") are companies licensed to import[2] liquors into Hawaii and to sell them at wholesale to other licensees. Hawaii imposes a tax on the first sale at wholesale of liquor, at a rate of 20% of the wholesale price (which includes freight charges, customs duties and federal taxes, and the wholesaler's markup). The tax is payable by the wholesaler whether or not it is collected from the purchaser, and is assessed on monthly gross sales reported to the State.

Over the years' Hawaii's legislature has experimented with exemptions from the tax designed to foster various local liquor industries. From 1960 to 1965, when the rate of tax was 16%, okolehao (a brandy distilled from the roots of the ti plant) produced in Hawaii was exempted

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[1]The wrinkle provided in this case comes from the fact that the industry concerned is liquor, with its unique set of precedents under the Twenty-first Amendment, and yet neither the State nor the courts below relied on that Amendment in upholding the tax.

[2]In the context of this case, "import" as a verb is used in its plain sense of "to bring into", without implying a foreign point of origin. Mindful of the distinction created by Woodruff v. Parham (75 U.S. [8 Wall.] 123 [1869]), however, appellants in this brief will use the adjective "imported" to apply only to liquor brought into Hawaii from a foreign country, as distinguished from liquor brought into Hawaii from (or through) one of the other 49 states. Each appellant is licensed to bring, and during the periods of tax protested has brought, imported liquor into Hawaii for sale at wholesale; and since 1979 each appellant has paid under protest its taxes on the sale of such imported liquor (see text at n. 11 *infra*).

from the tax.[3] This exemption expired in 1965, was reenacted in 1971,[4] was extended again in 1976,[5] and expired in 1981. By the same act in 1976, a five-year exemption from the liquor tax was also granted to wine made in Hawaii from fruit grown in the State.[6] This exemption likewise was allowed to lapse in 1981. However, in its 1981 session, while the present cases were pending before the Hawaii Supreme Court, the Legislature enacted and the Governor approved a new exemption for "rum manufactured in the State for the period May 17, 1981 to June 30, 1986."[7]

The legislative history of these exemptions makes their purpose clear: to promote the development and growth of the local liquor industry concerned, and to provide five-year protection blankets during which the local products could compete against imports with the advantage of a lower cost because of the tax exemption. The purpose of the original 1960 exemption for okolehao was stated to be "to encourage and promote the establishment of a new industry."[8] The 1976 exemptions were justified by the Senate Ways and Means Committee as follows:[9]

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[3]1960 Haw. Sess. Laws, c. 26, § 1.

[4]1971 Haw. Sess. Laws, c. 62, §1.

[5]1976 Haw. Sess. Laws, c. 39, § 1 (H.R.S. § 244-4[6]).

[6]1976 Haw. Sess. Laws, c. 39, §1 (H.R.S. § 244-4[7]).

[7]1981 Haw. Sess. Laws, c. 182, §1, currently in effect as H.R.S. § 244-4(8). The Hawaii Supreme Court was asked to take judicial notice of this amendment and its legislative history (see n. 10 *infra*) at the oral argument, but in the view it took of the case it did not find it necessary to do so.

[8]1960 Haw. Sen. Journal, Standing Comm. Rep. No. 87. The bill in its original form exempted the sole manufacturer by name (*ibid.*, and see Standing Comm. Rep. No. 222).

[9]1976 Haw. Sen. Journal, Standing Comm. Rep. No. 408-76.

The purpose of this bill is to extend the exemption of okolehao manufacture in the State from the liquor tax for an additional five years, to June 30, 1981. It is hoped that this five-year extension will aid the local okolehao industry to get on a firm financial foundation.

Your Committee has amended this bill to provide a similar five-year exemption to the local fruit wine industry. Testimony received indicates that there may be an economic potential to the State in this area which, hopefully, this bill can help stimulate.

The Conference Committee Report on the latest exemption, for Hawaii-made rum, shows that the Legislature continues to hew to its avowed purpose of local protection:[10]

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[10] 1981 Haw. Sen. Journal, Conf. Comm. Rep. No. 29. The debate on the Report was as follows:

Senator Abercrombie moved that Conf. Comm. Rep. No. 29 be adopted and H.B. No. 247, S.D. 2, C.D. 1, having been read throughout, pass Final Reading, seconded by Senator Henderson.

Senator Kawasaki rose to speak against the measure as follows:

"Mr. President, generally, I support giving tax exemption to new industries, particularly regarding the manufacture of Hawaiian Liquor, but I have some doubts about an arbitrary five-year exemption that we are providing this particular industry. I'd like to allow them the exemption as long as they need it but a blanket five years without showing cause for it might not be the wisest thing. For that reason, I'd like to vote against this bill."

Senator Henderson remarked: "Mr. President, we have consistently given five-year exemptions, in the initial periods, to these alcohol industries."

Senator Cayetano added his remarks as follows:

"Mr. President, voting with reservations for the bill, my concern is that with respect to new industries, it seems that we

> The purpose of this bill is to exempt rum manufactured in the State from the liquor tax for five years. . . . Your Committee is aware of the consolidated cases in the State Tax Appeal Court, Civil Nos. 1852, 1862, 1866 and 1867, under the name *Bacchus Imports, Ltd., et al. v. Freitas,* currently pending in the State Supreme Court, regarding the validity of certain liquor tax exemptions, and has had extensive discussions with the Attorney General's Office and the State Tax Department regarding the cases. Your Committee also notes that opinions conflict as to whether or not the national tax structure provides an advantage to rum produced in Puerto Rico and therefore makes no findings on that issue. Your Committee does feel, however, that providing a tax incentive in the form of a liquor tax exemption for a period of years is an appropriate method of encouraging the development of a new industry in the State and is therefore in agreement with the intent of the bill.

Appellant Bacchus made its May 1979 payment of liquor tax under protest,[11] and cited as grounds therefor that the Hawaii liquor tax violated the Import-Export and Commerce Clauses of the United States Constitution. In June 1979 it filed suit on the same grounds in the Hawaii Tax Appeal Court, and appellant Eagle followed with its payment under protest in August 1979 and its complaint in September 1979. By subsequent stipulation, there was later added by amendment to each complaint a claim that

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> have taken a very selective approach. There's really no rationale for us to give one new industry tax exemption status over another. I suggest that when we come into session next year we consider a more comprehensive approach."

Id., 59th Day, at p. 751.

[11]Payment of Hawaii taxes under protest, and subsequent suit for their refund, is provided for in H.R.S. § 40-35, as amended.

the tax violated the Equal Protection Clauses of both the United States and Hawaii Constitutions.[12] The cases were consolidated and heard on stipulated facts in the Hawaii Tax Appeal Court. The decision of that Court, written by the Hawaii Attorney General's office on the ex parte request of the Tax Appeal Court (see App. B, *infra*, A-41), ruled on plaintiffs' Import-Export Clause and Commerce Clause contentions, holding in favor of the tax, but did not deal with the Equal Protection arguments.

The taxpayers' appeals to the Hawaii Supreme Court were consolidated, and briefed and argued on the facts stipulated in the Tax Appeal Court. Again appellants raised the same constitutional issues argued below. In an opinion which rejected in turn each of appellants' contentions with respect to those issues, the Hawaii Supreme Court ruled that the tax was constitutional:

(i) Despite the plain language of this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 288 at n. 7 (quoted *infra*, p. 13) (1976), and the holding of this Court in *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964), it held that the tax was in effect "an excise levied on wholesalers" (App. A, *infra*, at A-20), rather than a prohibited duty that singled out imports by place of origin;

(ii) Despite the holding of this Court in *Maryland v. Louisiana*, 451 U.S. 725, 759-760 (1981),[13] it held

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[12]Art 1, § 5 of the Hawaii Constitution provides in part: "No person shall be . . . denied the equal protection of the laws . . ."

[13]Maryland v. Louisiana invalidated a "first use" tax on gas because of exemptions from the tax which favored Louisiana residents. The Hawaii tax is no less unconstitutional because of its

that since the tax fell only "on wholesalers of liquor in Hawaii", and applied only to unique local products, it was not an undue burden on interstate or foreign commerce (App A., *infra*, at A-28-30); and

(iii) Despite this Court's twin rulings in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) and *Allied Store of Ohio v. Bowers* (1959), the court found again that since "[o]n its face, the Hawaii law applies equally to all wholesalers", and since "[n]o one could quarrel with the proposition that the promotion of domestic industry is a legitimate state purpose",[14] the tax did not violate the Equal Protection Clause.

THE FEDERAL QUESTION IS SUBSTANTIAL

Although presenting issues involving three different clauses of the United States Constitution, this case in reality turns on just one fundamental principle of fed-

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exemptions which favor Hawaii-made *products*, yet the Hawaii Supreme Court felt it could distinguish Maryland v. Louisiana on this basis. *See also* n. 15 *infra*.

[14]Appendix A, *infra*, at A-11, 13. The court's citation of authority for this proposition is misleading. Western & Southern Life Insurance Co. v. Board of Equalization, 451 U.S. 648 (1981), did *not* hold, as stated in Justice Nakamura's opinion, that "the promotion of domestic industry is a legitimate state purpose"; what the decision said was "promotion of domestic industry *by deterring barriers to interstate business* is a legitimate state purpose: (451 U.S. at 671, emphasis added.) In that case, a retaliatory tax equalizing California's tax on foreign insurers with the tax imposed on California insurers by the foreign insurers' home State was upheld on the ground that the rational and legitimate purpose of the tax was to encourage other States to lower their tax on California insurers. No suggestion has ever been made, least of all by the Hawaii Supreme Court, that Hawaii's liquor tax is designed to have a similar effect. The liquor tax is not retaliatory; it is simply discriminatory. It does not deter barriers; it creates them.

eralism, gleaned through experience under the Articles of Confederation, embodied by the Framers in the Constitution itself, and iterated time and again by this Court through the centuries: *No State may erect an economic barrier against out-of-state products or services in order to provide a commercial advantage to local business.*

The Hawaii liquor tax on its face singles out products for exemption by place of origin, and they are all products defined as made in Hawaii.[15] The Legislature could not have made its purpose plainer in passing the exemptions; nor could it (with its history of past exemptions, and with the

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[15]At various places in its opinion, the Hawaii Supreme Court seems to imply that because the products exempted are not the usual type of product found in commerce, but are unique to Hawaii, the volume of commerce involved is insubstantial and therefore the question is insubstantial. Apart from the obviously erroneous premise (the latest product to be exempted—rum—can hardly be considered unique to Hawaii), the fallacy in such an implication has been answered by this Court before: First, by Justice Marshall in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 439 (1827), when he observed:

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.

[*Id.* at 439.]

(*Brown* itself involved an "impost" of only $50.) And, most recently, on the question of the degree of discrimination in a tax, this Court in Maryland v. Louisiana, 451 U.S. 725, 759-760 (1981) said:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

passing of the most recent exemption) have demonstrated more clearly its intent to continue adopting such provisions unless and until told that they render the tax unconstitutional.[16]

The question involved is only one of federal law; there is no dispute as to state law or its interpretation. The precise type of tax at issue—a state ad valorem tax on imported liquor—has not been presented to this Court before,[17] but its unconstitutionality under the precedents of this Court is not seriously open to question. More than one hundred years ago, in *Guy v. Mayor of Baltimore*, 100 U.S. 434, 438-439 (1880), Justice Harlan anticipated a question similar to that involved here:[18]

> In *Hinson v. Lott*, 8 Wall. 148, 19 L.Ed. 387, we upheld a Statute of Alabama, imposing taxes upon the sale of spirituous liquors within its limits, upon the ground

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[16]See the legislative history of the five separate exemptions to the liquor tax passed by the Hawaii legislature between 1960 and 1981, set out *supra*, pp. 5-7.

[17]The precise question here involved was presented to the New York Court of Appeals in People v. Maring, 3 Keys 374 (N.Y. 1867), a precedent cited to but spurned by the Hawaii Supreme Court. The case held that a New York statute which imposed a tax upon the sale by brokers of "foreign wines and ardent spirits," and of "all goods, wares, merchandise and effects imported from any place beyond the Cape of Good Hope . . . or which are the production of any foreign country," violated the Import-Export Clause of the United States Constitution.

[18]The decision in Guy v. Mayor of Baltimore, a case decided under the Commerce Clause, of course antedated the Twenty-first Amendment and the cases discussed in n. 19 *infra;* however, the analysis implicit in Justice Harlan's example dealing with interstate discrimination against liquor is identical to that followed in People v. Maring (*supra*, n. 17), which dealt with the Import-Export Clause.

> that it did not discriminate against the products of other States, and only subjected them to the same taxation imposed upon similar articles manufactured in that State. Had the statute been susceptible of a different construction, it would have been held repugnant to the Constitution.

The intervening passage of the Twenty-first Amendment and some of the cases arising under it[19] may have focused attention elsewhere for awhile, but the exclusive power of Congress over foreign trade in liquor was reaffirmed by this Court's opinion in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-346 (1964).[20] Most

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[19]Under the decisions of this Court in Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938), Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939), and Joseph S. Finch Co. v. McKittrick, 305 U.S. 395 (1939), the Hawaii tax might not have been regarded as unconstitutional under the Commerce Clause if it applied only to liquor brought in from other states. (More recent decisions of this court indicate, however, that the unfettered discretion previously afforded to the states in taxing and regulating the sale of liquor has to be balanced against competing Federal interests on a case-by-case basis. See Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 [1964]; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 106-110 [1980].) Because the Hawaii Liquor Tax applies broadly to all imports, however, including liquor imported from foreign countries, this Court's decisions under the Import-Export Clause are called directly into play. As is shown in the quotations in n. 20 *infra* and the text following, two of those decisions alone govern the disposition of this case, and to that extent the Commerce Clause and Equal Protection Clause issues are subordinate.

[20]In the *James Beam* case this Court declared unconstitutional, in the following words, a gallonage tax imposed by Kentucky on shipments of foreign whisky into the State:

> To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Import-

recently, in its opinion in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 288 at n. 7 (1976), this Court again envisioned the type of tax here involved, and indicated plainly its unconstitutionality:

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an 'initial sale' of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost. Nothing in the opinion in Brown v. Maryland should suggest otherwise. The Court in Brown merely presumed that at these later stages of commercial activity, state impositions would not be discriminatory.

THE CONFLICT WITH CONTROLLING PRECEDENT IS SUBSTANTIAL

The Hawaii court's deviation from the foregoing precedents is so flagrant, and so manifest, that the substantiality of the questions presented by this appeal derives even more from the final authority of this Court in constitutional matters than from the nature of the question itself. (This is not a case involving conflicting state precedents; the few state court decisions that did seek to claim the power asserted by Hawaii in this case have been reversed.[11]

> Export Clause so far as intoxicants are concerned. [Footnote omitted.] Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion. This Court has never intimated such a view, and now that the claim for the first time is squarely presented, we reject it. [*Ibid.*]

[11] *E.g.*, Boston Stock Exchange v. State Tax Commission, 37 N.Y. 2d 535, 337 N.S.2d 758 (1975), *reversed*, 429 U.S. 318 (1977); I. M. Darnell & Son Co. v. Memphis, 116 Tenn. 424, 95 S.W. 816 (1907), *reversed*, 208 U.S. 113 (1908).

Nor is this a case involving a novel or untried principle of constitutional law—as noted above, the principle at stake is nothing less than a fundamental principle of federalism, upheld in numerous decisions of this Court.) Since the decision on this appeal will be a decision on the merits, and if the foregoing precedents are not deemed sufficiently controlling to warrant a summary reversal, then probable jurisdiction should be noted in order to permit fuller consideration of the effect of this case on those precedents.[22]

THIS WILL BE THE ONLY OPPORTUNITY FOR A FEDERAL COURT TO RULE ON THE FEDERAL ISSUES PRESENTED

The fact that this case is brought on an appeal, rather than on a writ of certiorari, is another facet of the substantiality of the question presented. For this case is one of the few in which the federal questions raised can be passed on only by this Court, as opposed to a lower federal court in the first instance, because the latter are precluded from hearing the case by the Tax Injunction Act, 28 U.S.C. § 1341. The procedure followed by the taxpayers in this case—payment of the taxes under protest, and then a suit for refund—is the only one available to raise the federal constitutional issues involved,[23] and it is imperative for the

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[22]See Colorado Springs Amusements, Ltd. v. Mayor of Philadelphia, 428 U.S. 913 (1976) (Brennan, J. dissenting).

[23]See Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300-301 (1943):

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first

integrity of the federal system that the Hawaii Supreme Court's decision not become the final word on the subject.

CONCLUSION

The decision of the Hawaii Supreme Court appealed from flouts, and even ignores, controlling precedent. It misconstrues the precedent which it does recognize, and arrives at an isolationist conclusion that is wholly incompatible with our federal system. It should be summarily reversed, or at a minimum probable jurisdiction should be noted and the case set for briefing and oral argument.

Respectfully submitted,

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Attorney for Appellants

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instance to the United States district courts . . . H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3 (1937). The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful State tax, and which led to the enactment of the Act of August 21, 1937 [the Tax Injunction Act], are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the Court. With due regard for these considerations, it is the Court's duty to withhold such relief, when, as in the present case, it appears that the State legislature has provided that on payment of any challenged tax to the appropriate State officer, the taxpayer may maintain suit to receive it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the State's administration of its taxes.

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On Appeal from the Supreme Court of the State of Hawaii

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1982

In the Matter of the Tax Appeals of
BACCHUS IMPORTS, LTD., PARADISE
BEVERAGES, INC., EAGLE
DISTRIBUTORS, INC., and FOREMOST-
McKESSON, INC., dba McKESSON WINE &
Spirits Co., Taxpayers

NO. 7802

APPEAL FROM THE TAX APPEAL COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

(CASE NOS. 1852, 1862, 1866, 1867)

DECEMBER 23, 1982

RICHARDSON, C.J., LUM, NAKAMURA,
PADGETT AND HAYASHI, JJ.

CONSTITUTIONAL LAW - equal protection of laws; equal rights - taxation - in general. TAXATION - constitutional requirements and restrictions - equality and uniformity - in general - constitutional requirements and operations thereof in general.

Although the strictures of the Equal Protection Clause condition the exercise of a state's power of taxation, the Fourteenth

Amendment was not intended to compel the State to adopt an iron rule of equal taxation.

CONSTITUTIONAL LAW - construction, operation, and enforcement of constitutional provisions - determination of constitutional provisions - determination of constitutional questions - presumptions and construction in favor of constitutionality - in general.

SAME - equal protection of laws; equal rights - taxation - in general.

OPINION OF THE COURT BY NAKAMURA, J.

In this appeal from the Tax Appeal Court, four wholesalers of liquor, Bacchus Imports, Ltd., Paradise Beverages, Inc., Eagle Distributors, Inc., and Foremost-McKesson, Inc. (Bacchus, Paradise, Eagle and McKesson respectively, the taxpayers collectively) challenge, on constitutional grounds, the levy of excise taxes on the sale or use of liquor pursuant to HRS § 244-4. 1/ They assert the statute in question runs afoul of the Equal Protection, 2/ Import-Export, 3/ and Commerce Clauses 4/ of the United States Constitution. 5/ Though we have carefully scrutinized the statute with the cited constitutional provisions in mind, we discern no infirmities in HRS §244-4. We therefore affirm the Tax Appeal Court's decision.

I.

The Hawaii Liquor Tax, HRS Chapter 244,

imposes a levy on the sale or use of alcoholic beverages amounting to twenty percent of the wholesale price of the liquor sold or used, which essentially is an excise levied on the first sale of liquor within the State of Hawaii. *See* note 1 *supra*. At its inception, the tax was one imposed on retailers, and the amount of the levy was six percent of the retail price. S.L.H. 1939, c. 222, § 5. But its incidence has since been shifted to wholesalers and the rate has been raised to twenty percent of the wholesale price. 6/ Limited exemptions from the tax have been approved periodically by the legislature; transactions involving okolehao 7/ and "[a]ny fruit wine manufactured in the State from products grown in the State" 8/ were thus free of taxation during the relevant period. This aspect of the Hawaii Liquor Tax has been challenged by the taxpayers.

Bacchus, Paradise, [9] and Eagle are Hawaii corporations licensed to engage in the wholesaling of liquor; McKesson is a Maryland corporation authorized to do business in Hawaii, also licensed as a wholesale liquor dealer under applicable liquor control laws. See HRS Chapter 281. Bacchus initially protested the assessment of excise taxes on its sale or use of alcoholic beverages by a letter directed to the State Director of Taxation on May 30, 1979. It subsequently filed a complaint pursuant to HRS § 40-35, [10] seeking a refund of taxes paid during the period between December 1977 and May 1979. Paradise, Eagle, and McKesson quickly followed Bacchus' lead with their letters of protest to the Director and refund suits. [11]

The taxpayers' complaints averred that HRS §244-4 contravened the Import-Export and Commerce Clauses of the federal constitution

because the statute discriminated in favor of locally produced liquor by providing exemptions for sales and uses of okolehao and fruit wine brewed in Hawaii from locally grown products. The cases were consolidated for trial and disposition by agreement of all the parties and submitted to the Tax Appeal Court for decision on Stipulations of Facts. The court ruled the tax is "a valid State tax," and timely appeals to this court were filed by the taxpayers.

II.

Focusing on the allegations of unconstitutionality advanced by the taxpayers, we first consider their claim that the favored treatment of okolehao and locally produced fruit wine denies them equal protection.

A.

We recognize, of course, that the strictures of the Equal Protection Clause condition the exercise of a state's power of taxation. Bell's Gap Railroad v. Pennsylvania, 134 U.S. 232 (1890). Still, "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." Id. at 237. For such a construction

> would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.

Id. Moreover, "[i]t has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." Madden

v. Kentucky, 309 U.S. 83, 88 (1940) (footnote omitted). And "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Id. (Footnote omitted).

The legislative arrangement in question, the taxpayers claim, breaches the equal protection guaranty because of its favored treatment of transactions involving okolehao and pineapple wine. But the statute does not establish a classificatory scheme that disfavors any of the taxpayers--all wholesalers of liquor distributing alcoholic beverages in Hawaii are subject to taxation thereunder in similar fashion. Bacchus, Paradise, and Eagle enjoy no advantage over McKesson, a Maryland corporation, by reason of their incorporation under Hawaii law since their transactions are taxed at the same rate McKesson's are.

B.

The taxpayers nonetheless contend Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), and Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), sustain their thesis that the necessary equality of treatment is absent. To be sure, the cases support a proposition that a state tax expressly favoring residents over nonresidents does not pass constitutional muster. Yet we think the cited cases do not boost the taxpayers' cause here; they reinforce instead the validity of the Hawaii Liquor Tax.

In Wheeling Steel, the Court struck down provisions of Ohio's ad valorem property tax law that discriminated aginst foreign corporations by taxing their accounts receivables arising from business transacted within the State but not the property of similar nature owned by residents and domestic corporations. The inequality to which

the foreign corporations were subjected was premised solely on the residence of the owners of the accounts receivables. [12/] And the Court did not consider the declared purpose of the statute to proffer a scheme of reciprocity in the taxation of such property to other states a redeeming feature. Wheeling Steel Corp. v. Glander, 337 U.S. at 572-74.

In Allied Stores, Ohio's levy of an ad valorem property tax on the contents of warehouses was upheld despite an exemption of merchandise belonging to nonresidents and being held "'in a storage warehouse for storage only'." The preferred status accorded merchandise owned by nonresidents, the Court held, did not deny Ohio residents equal protection; it found the purpose and policy of the State Legislature could reasonably have been to encourage nonresidents to construct or lease warehouses in Ohio

and thereby benefit the State's economy. Allied Stores of Ohio v. Bowers, 358 U.S. at 528-29. Thus it concluded the questioned proviso was neither invidious nor palpably arbitrary, and ruled the statute did not deny equal protection to Ohio residents despite the discriminatory classification.

The cited cases therefore confirm that the Court does not countenance the unequal treatment of taxpayers based solely on state residence, Wheeling Steel Corp. v. Glander, 337 U.S. at 572; but if the classification rests upon some reasonable consideration of difference or policy, there is no denial of equal protection. Allied Stores of Ohio v. Bowers, 358 U.S. at 527-28. On its face, the Hawaii law applies equally to all wholesalers; the taxpayers, however, assert the classification in question carries a discriminatory result. We thus proceed to an examination of the exemption from excise

taxation of transactions involving okolehao and pineapple wine to determine whether the exemption is rationally related to the achievement of a valid legislative purpose.

C.

In deciding whether the challenged classification meets this test of rational relationship, we are compelled to answer two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? See Minnesota v. Clover Leaf Creamery Co., 449 U.S., at 461-463; Vance v. Bradley, 440 U.S. 93, 97-98 (1979)." Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 668 (1981). Shibuya v. Architects Hawaii, Ltd, 65 Haw. 26, 35, 647 P.2d 276, 283 (1982).

The legislature's reason for exempting

"ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products frown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056. 13/ No one could quarrel with the proposition that the promotion of domestic industry is a legitimate state purpose. See Western & Southern Life Insurance Co. v. State Board of Equalization, 451. U.S. at 671; Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970); Parker v. Brown, 317 U.S. 341, 363-67 (1943).

We likewise entertain no doubt that the classification satisfies the second part of the applicable test, for the pertinent in-

quiry here is only whether the "legislature <u>rationally could have believed</u> that the . . . . [classification] would promote its objective." Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. at 672 (citations omitted) (emphasis in the original). The lawmakers are under no obligation "to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' Vance v. Bradley, 440 U.S., at 111." Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 464. The taxpayers have not met their burden in this regard. The legislature could rationally have believed the exemption would promote its objective, and nothing has been presented to controvert this.

D.

The taxpayers' equal protection claim also encompasses a putative breach of the State counterpart of the Equal Protection Clause. Compare U.S. Const. amend. XIV, § 1 and Hawaii Const. art. 1, §5. In passing on an earlier taxpayer challenge of our tax laws premised on an alleged violation of the foregoing State constitutional provision, we structured our analysis on Supreme Court precedent, particularly Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). See In re Simpson Manor, Inc., 57 Haw. 1, 548 P.2d 246 (1976). And Lehnhausen was quoted to the following effect:

> '"[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." . . . "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."'

Id. at 8-9 548 P.2d at 251 (citation omit-

ted) (emphasis in the original). The claim there was rejected because the taxpayer had "failed to meet its burden"; we perceive no reason to regard the present challenge more favorably. Id. The taxpayers have not even attempted to negative the declared basis for enacting the exemptions.

III.

Having found no denial of equal protection, we turn to the assertion that the Hawaii Liquor Tax contravenes the Import-Export Clause of the federal constitution. The taxpayers contend that HRS § 244-4 is discriminatory on its face and thus violative of the clause because of the exemption of transactions involving locally produced okolehao and fruit wine. They further assert the excise tax is actually a prohibited import duty since it is levied on wholesale value, which in the case of liquor of foreign origin perforce includes the amount of

the duty levied by the federal government and transportation cost. This, they maintain, results in a disproportionate State levy on liquor of foreign origin. They slso claim the rate at which the tax is applied deters the consumtion of such liquor and indirectly deprives the federal government of revenue. The precepts enunciated in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), and ratified by Washington Revenue Department v. Stevedoring Association, 435, U.S. 734 (1978), in the taxpayers' view, proscribe the imposition of the tax. We do not read the Import-Export clause and Michelin to have such effect.

A.

The Import-Export Clause commits "sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power." Michelin Tire Corp. v.

Wages, 423 U.S. at 285. But "the term 'impost or duty' is not self-defining and does not necessarily encompass all taxes." Washington Revenue Department v. Stevedoring Association, 435 U.S. at 759. The foregoing cases give us examples of what is not encompassed therein. In the former, the Court held Georgia's levy of a general ad valorem property tax on Michelin's inventory of imported tires and tubes stored in a Georgia warehouse was not interdicted by the Import-Export Clause. Michelin Tire Corp. v. Wages, 423 U.S. at 302. And in Washinton Revenue Department, the application of Washington's business and occupation tax to stevedoring was approved, even though it reached services provided within the State "to imports, exports, and other goods." Washington Revenue Department v. Stevedoring Association, 435 U.S. at 761.

In reaching these decisions, the Court

"examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause:

> 'The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."

Washington Revenue Department v. Stevedoring Association, 435 U.S. at 752-53 (quoting Michelin Tire Co. v. Wages, 423 U.S. at 285-86) (footnotes omitted). Our task then is to scrutinize HRS § 244-4 in the light of the concerns that, in the Court's opinion, explain the presence of the clause.

B.

HRS § 244-4 provides that "[e]very person who sells or uses any liquor . . . [not

previously taxed thereunder] shall pay an excise tax . . . equal to twenty percent of the wholesale price of the liquor so sold or used." As the tax is usually imposed on the person who engages in the first sale or use of liquor in the State and is measured by wholesale value, it is in effect an excise levied on wholesalers. In this sense, it resembles the Washington business and occupation tax that was deemed a permitted tax, rather that a prohibited import duty, by the Court. The taxpayers, however, claim an objectionable feature, the exemption of okolehao and fruit wine, causes it to transgress the first two policy considerations underlying the Import-Export Clause. We do not find their argument convincing, for like the Georgia property tax and the Washington business and occupation tax, the Hawaii Liquor Tax offends none of the policy considerations delineated by the Court

in _Michelin_ and _Washington Revenue Department_. 14/

Hawaii's tax on wholesaling activity applies to all liquor wholesalers engaged in business in the State. It touches all local sales and uses of liquor produced in foreign countries, in the mainland States, and in Hawaii, with the exception of okolehao and pineapple wine. 15/ There is absolutely no indication that it has been applied selectively to discourage imports in a manner inconsistent with foreign policy. Nor is there a scintilla of evidence that it has the effect of a protective tariff or that it has any substantial indirect effect on the demand for imported liqour. And no reason whatsoever to consider the limited exemption a threat to the federal treasury appears. 16/ _Michelin_ and _Washington Revenue Department_ thus sustain a conclusion that the tax in question is not a prohibited import duty. _See_ note 14 _supra_.

IV.

Though we have concluded the Hawaii Liquor Tax infringes neither the Equal Protection Clause nor the Import-Export Clause, whether it "falls short of the substantially even-handed treatment demanded by the Commerce Clause" remains for decision. Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 332 (1977).

A.

"In reviewing Commerce Clause challenges to state taxes . . . [the Court's objective] has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980)." Commonwealth Edison E. v. Montana, 453 U.S. 609, 615 (1981). The method of inquiry presently favored by the Court is the four-part test described in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). "Under that test, a

state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279." Commonwealth Edison Co. v. Montana, 453 U.S. at 617.

The taxpayers do not dispute that the Hawaii Liquor Tax satisfies the first and fourth prongs of the test, for the activity subject to taxation is the wholesaling of liquor in Hawaii and the revenues derived are for the support of general governmental services. The tax is challenged on grounds that it does not meet the test's second and third requisites, i.e., it is discriminatory and not fairly apportioned. But we are also unable to perceive any basis to seriously consider the taxpayers' assertion that the tax is not fairly apportioned

since they agree it is assessed only on intrastate sales and uses of liquor. It has no extraterritorial effect and the State does not seek thereby to obtain a share of a taxpayer's net income derived from an interstate enterprise. Nor is there a possibility that it will subject "interstate business to a burden of duplicative taxation that an intrastate taxpayer would not bear." Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. at 443. No issue related to fair apportionment is extant, and our examination of the tax centers on whether it discriminates against interstate commerce.

B.

In our analysis of the equal protection claim, we discerned no disparate treatment of taxpayers. For Bacchus, Paradise, and Eagle gain nothing over a foreign corporation because of their incorporation un-

der Hawaii law. That McKesson is a Maryland corporation and engaged in business elsewhere plays no part in fixing its liability under HRS §244-4. The corporation presumably is also free to engage in the wholesaling of okolehao and pineapple wine if it has reason to believe this will relieve its tax burden. 17/ We detect no discrimination against Bacchus, Paradise, Eagle, McKesson, or interstate commerce under the circumstances.

The taxpayers nonetheless argue Maryland v. Louisiana, 451 U.S. 725 (1981), and its precursors preclude the validation of HRS §244-4. Maryland was an original action brought in the Supreme Court by several states and the federal government, challenging the Louisiana First-Use Tax on natural gas on grounds that it contravened the Supremacy and Commerce Clauses. We are, of course, mindful of the following precepts

of "Commerce Clause jurisprudence" that were reiterated by the Court there:

> One of the fundamental principles of Commerce Clause Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959). See Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977). This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. Boston Stock Exchange, supra. See Dean Milk Co. v. [City of] Madison, 340 U.S. 349,356 (1951).

Id. at 754, and

> A state tax must be assessed in light of its actual effect considered in conjunction wiht other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' Best & Co. v. Maxwell, 311 U.S. 454,455-456 (1940). See Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64,69 (1963); Gregg Dyeing Co. v. Query, 286 U.S. 472, 478-480 (1932). In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions.

Id. at 756.

Yet, Hawaii's excise on intrastate sales and uses of liquor can hardly be likeened to Louisiana's tax on the "first-use" of any natural gas brought into the state without being taxed previously by another state or the federal government. The primary impact of that levy was on gas produced in the Outer Continental shelf and piped to processing plants in Louisiana. Some of this gas was sold to Louisiana consumers, but most of it was eventually sold to out-of-state consumers. Louisiana consumers for the most part were not burdened with the levy due to exemptions and credits provided by State law, but the tax applied uniformly to gas moving out of the state. Id. at 731-33. The Court found the "First-Use" Tax, while imposed on the pipeline companies, . . . [was] clearly intended to be passed on to the ultimate consumer." Id. at 736. And it struck down a scheme of taxation

that "resulted in Louisiana customers being 'protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State.'" Id. at 758. Unlike the situation in Maryland v. Louisiana, supra, the incidence of the tax here is on wholesalers of liquor in Hawaii and the ultimate burden is borne by consumers in Hawaii.

Nor can HRS § 244-4 be equated with the New York statute imposing a transfer tax on securities transactions which was invalidated by the Court in Boston Stock Exchange v. State Tax Commission, supra. For there, an amendment to the theretofore uniform tax caused transactions involving out-of-state sales to be taxed more heavily than most transactions involving in-state sales. 18/ The instant situation also bears no likeness to that in Halliburton Oil Well Cementing Co. v. Reily, supra, where the

taxpayer was engaged in servicing oil wells in Louisiana and several other oil-producing states and the specialized servicing equipment it had assembled in Oklahoma and used in its Louisiana operation was subjected to use taxation by Louisiana, which applied the tax to the value of labor expended and shop overhead incurred in assembling the equipment. The State conceded this cost factor would not have been subject to taxation if the taxpayer had assembled the equipment in Louisiana rather than in Oklahoma. Id. at 66-67. [19/] The Court logically concluded a condition precedent for a valid state tax, the even-handed treatment of in-state and out-of-state taxpayers, had not been met. Id. at 70. But the Louisiana use tax cannot be categorized with the Hawaii Liquor Tax. [20/]

The tax in question here is definitely not a barricade against the movement of trade, see e.g., City of Philadelphia v.

New Jersey, 437 U.S. 617 (1978); Dean Milk Co. v. City of Madison, supra, nor is it a means through which Hawaii seeks more than a just share of the income earned by taxpayers engaged in multi-state enterprises. See e.g., Mobil Oil Corp. v. Commissioner of Taxes, supra; Northwestern States Portland Cement Co. v. Minnesota, supra. And our survey of the case law of Commerce Clause litigation in the Supreme Court has uncovered no instance where a state tax of similar nature has been voided. The taxpayers have failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce. 21/

The decision of the Tax Appeal Court upholding the assessment of the tax against Bacchus Imports, Ltd., Paradise Beverages, Inc., Eagle Distributors, Inc., and Foremost-McKesson, Inc. is affirmed.

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Joined in Opening Briefs of Bacchus Imports, Foremost-McKesson & Eagle Distributors:

/s/ Frank D. Padgett

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/s/ Yoshimi Hayashi

T. Bruce Honda (Allan S. Chock on the brief), Deputy Attorneys General, for defendant-appellee Director of Taxation

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1/ HRS § 244-4, in pertinent part, read as follows when the taxes in question were assessed:

> Every person who sells or uses any liqour not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty percent of the wholesale price of the liquor so sold or used; provided, that the tax shall be paid only once upon the same liquor; provided, further, that the tax shall not apply to:
>
> . . . .
>
> (6) Okolehao manufactured in the State for the period May 17, 1971 to June 30, 1981; or
>
> (7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981.

2/ The Fourteenth Amendment to the federal constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3/ Article I, § 10, cl. 2 of the federal constitution reads:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Impost. laid by any State on Imports, or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

4/ Article I, § 8, cl. 3 of the federal constitution reads:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

5/ Article I, § 5 of the Hawaii Constitution reads:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

6/ S.L.H. 1947, c. 111, § 14 raised the tax rate from six percent to eight percent; S.L.H. 1949, c. 343, § 3 shifted the tax incidence to wholesale transactions and increased the rate to twelve percent of the wholesale price; S.L.H. 1957, c. 1, § 7(b) (special session; 1957 Tax Act) raised the rate to sixteen per-

cent; S.L.H. 1965, c. 155, § 8 increased the rate to twenty percent.

7/ Okolehao is an alcoholic beverage made from the root of the ti plant, an indigenous shrub. The exemption of okolehao was initially approved in 1960 and remained in effect until 1965. S.L.H. 1960, c. 26 § 1. The exemption was reenacted in 1971 to cover a five-year period. S.L.H. 1971, c. 62, § 1. In 1976, the exemption period was extended to June 30, 1981. S.L.H. 1976, c. 39, § 1.

8/ The only "fruit wine [that was] manufactured in the State from products grown in the State" during the relevant time span was pineapple wine. This exemption was approved in 1976 to cover a five-year period. S.L.H. 1976, c. 39, § 1.

9/ Paradise acknowledges it is a "beneficiary" of the exemptions from taxation proveded by HRS § 244-4 for okolehao and fruit wine produced in Hawaii. It nevertheless maintains the statute is unconstitutional probably because the volume of sales of the exempted products is relatively insubstantial.

10/ HRS § 40-35 authorizes a taxpayer to pay taxes under protest and to commence an action in the Tax Appeal Court for the recovery of the disputed sums. See In re Otis Elevator Co. 58 Haw. 163, 167 & n. 10, 566 P.2d 1091, 1094 & n. 10 (1977).

11/ The dates of the letters of protest and the periods for which refunds were sought are set forth below:

Taxpayer	Date of Letter	Period Protested per Letter
Bacchus Imports, Ltd.	May 30, 1979	December, 1977 through May, 1979
Paradise Beverages, Inc.	July 30, 1979	June, 1977 through July, 1979
Eagle Distributors, Inc.	August 31, 1979	August, 1974 through July, 1979
Foremost-McKesson, Inc.	September 6, 1979	August, 1974 through August, 1979

12/ The General Code of Ohio § 5328-1, challenged in Wheeling Steel, provided in pertinent part:

> Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person . . . shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons . . . shall not be subject to taxation. . . .

(Emphasis added).

The Hawaii Liquor Tax, on the other hand, exempts all sales and uses of okolehao and pineapple wine from taxation. It does not matter whether the transactions are engaged in by foreign corporations of Hawaii corporations. Furthermore, a foreign corporation manufacturing okolehao and pineapple wine in Hawaii would not be treated differently from a Hawaii corporation under the general excise tax law, HRS Chapter 237.

13/ The Supreme Court has stated that in equal protection analysis, it may be assumed "that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces . . . [a conclusion] that they 'could not have been a goal of the legislation.'" Minnesota v. Clover Leaf Creamery Col, 449 U.S. 456, 463 n.7 (1981) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

14/ The Court summarized the reasons why there was no breach of the clause in the foregoing situations in the latter case. With respect to the tax at issue in Michelin, it concluded in relevant part:

> The ad valorem property tax there at issue offended none of . . . [the] policies. It did not usurp the Federal Government's authority to regulate foreign relations since it did not 'fall on imports as such because of their place of origin.' . . . As a general tax applicable to all property in the State, it could not have been applied selectively to encourage or discourage importation in a manner inconsistent with federal policy. Further, the tax deprived the Federal Government of no revenues to which it was entitled. The exaction merely paid for services, such as fire and police protection, supplied by the local government. Although the tax would increase the cost of the imports to consumers, its effect on the demand for Michelin tubes and tires was insubstantial. The tax, therefore, would not significantly diminish the number of imports on which the Federal Government would levy import duties and would not deprive it of income indirectly.

Washington Revenue Department v. Stevedoring Association, 435 U.S. at 753 (citation omitted).

And its relevant conclusions with respect to the Washington tax were:

> A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.
>
> Second, the effect of the Washington tax on federal import revenues is identical to the effect in Michelin. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax on the imported goods themselves.

Id. at 754

15/ Okolehao and pineapple wine are not the only alcoholic beverages produced in Hawaii. Also produced here are fruit liqueurs and sake, a Japanese-type rice wine.

16/ We need not consider the third policy consideration described in Michelin and Washington Revenue Department since the taxpayers concede it does not apply to this case.

17/ We noted earlier that Paradise, a Hawaii corporation engaged in the wholesaling of okolehao, also claims the tax violates the Commerce Clause. See note 9 supra. We find it difficult to give much credence to a claim that the tax creates an undue burden on interstate commerce when the argument is advanced by one who logically would be a "beneficiary" of the alleged discrimination.

18/ The questioned legislative action and its effect were summarized as follows in the Court's opinion:

> [T]he legislature in 1968 enacted § 270-a to amend the transfer tax by providing for two deviations from the uniform application of § 270 when one of the taxable events, a sale, takes place in New York. First, transactions by nonresidents of New York are afforded a 50% reduction ('nonresident reduction') in the rate of tax when the transaction involves an in-state sale. Taxable transactions by residents (regardless of where the sale is made) and by nonresidents selling outside the State do not benefit from the rate decrease. Second, § 270-a limits the total tax liability of any taxpayer (resident or nonresident) to $350 (maximum tax) for a single transaction when it involves a New York sale. If a sale is made out-of-State, the § 270 tax rate applies to an in-state transfer (or other taxable event) without limitation.

Boston Stock Exchange v. State Tax Commission, 429 U.S. at 324-25 (footnotes omitted).

19/ The stipulation of facts upon which the case was submitted for decision stated in part:

> 'If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on Materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.'

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. at 67.

20/ We also have good reason to believe neither okolehao not pineapple wine is produced elsewhere. Thus, our situation is totally different from Halliburton where the equipment was assembled out of state, but could have been assembled in Louisiana too.

Furthermore, the producers of okolehao and pineapple wine are not exempted from payment of the general excise tax imposed by HRS Chapter 237.

21/ Though the taxpayers submitted no evidence on the amount of okolehao and pineapple wine sold in Hawaii, we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii.

We also find it unnecessary to address the taxpayers' claim that the rate of taxation in itself constitutes a violation of the Commerce Clause. "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." Commonwealth Edison Co. v. Montana, 453 U.S. at 627 (footnote omited).

APPENDIX B

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IN THE TAX APPEAL COURT OF

THE STATE OF HAWAII

BACCHUS IMPORTS, LTD., Plaintiff, vs. GEORGE FREITAS, Director of Taxation, Defendant.	CASE NO. 1852
PARADISE BEVERAGES, INC., Plaintiff vs. GEORGE FREITAS, Director of Taxation, Defendant.	CASE NO. 1862

EAGLE DISTRIBUTORS, INC., Plaintiff, vs. GEORGE FREITAS, Director of Taxation, Defendant.	CASE NO. 1866
FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS CO., Plaintiff, vs. GEORGE FREITAS, Director of Taxation, Defendant.	CASE NO. 1867 DECISION AND ORDER

DECISION AND ORDER

these proceedings involve the assesment of the liquor tax imposed pursuant to the provisions of HRS Chapter 244, the Hawaii Liquor Tax Law.

The facts in this case are set forth in the Stipulations of Facts on file with

the records of these appeals and are incorporated herein and by reference made a part of this Decision. The cases have been consolidated by stipulation for disposition.

Briefly stated, the facts are as follows:

BACCHUS IMPORTS, LTD., PARADISE BEVERAGES, INC., and EAGLE DISTRIBUTORS, INC., Taxpayers and herein Plaintiffs, are corporations organized and existing under the laws of the State of Hawaii. FOREMOST-McKESSON, INC., the other Plaintiff, is a Maryland corporation authorized to do business under the laws of the State of Hawaii. Taxpayers are all licensed dealers as defined by section 244-1, Hawaii Revised Statutes. At all times herein, Taxpayers were engaged in the wholesaling of intoxicating liquors in the State of Hawaii. The nature of their business includes the importation and distribution of liquor at the wholesale

level to various retail licensees throughout the State.

At the various times listed below, each Taxpayer sent a letter of protest together with its monthly return of the liquor tax. The letter of protest applied to that and all previous payments of the liquor tax up to a period of five years. Within 30 days of the initial letter of protest, each Taxpayer filed a Complaint for Refund of Liquor Taxes Paid, pursuant to section 40-35, HRS.

TAXPAYER		
Bacchus Imports, Ltd.	May 30, 1979	December 1977 thru May 1979
Paradise Beverages, Inc.	July 30, 1979	June 1977 thru July 1979
Eagle Distributors, Inc.	August 31, 1979	August 1974 thru July 1979
Foremost-McKesson, Inc.	September 6, 1979	August 1974 thru August 1979

The liquor is imported into Hawaii through three different routes. (1) Liquor originating in foreign countries and imported directly to Hawaii as the first port of entry. (2) Liquor originating in foreign countries which is imported by another State as the first port of entry and is thereafter purchased by Taxpayers and imported to Hawaii. (3) Liquor which originates in a State other than Hawaii and is imported to Hawaii.

All of the Taxpayers file their liquor tax returns with the State and report their gross sales each month, less sales exempted by Chapter 244. Taxpayers also remit the tax due per each return along with the return filed.

The wholesale price charged by Taxpayers is based upon the landed costs of the liquor. These costs include:

1. The original cost of the liquor

2. Ocean or air freight to Hawaii
3. Wharfage fees in Hawaii
4. Drayage charges for transportation to Taxpayers' warehouses
5. Brokerage fees
6. Customs, duties, and internal revenue taxes
7. Warehouse handling charges

Because of the added landed costs, the wholesale price is higher for liquors imported into Hawaii as compared with liquor which is manufactured locally. Locally manufactured liquor include Okolehao, fruit wine made from pineapple, fruit liqueurs and sake.

The Hawaii liquor tax is based upon the wholesale price of the liquor sold to licensees for use and consumption in the State of Hawaii. Exemptions from the tax are granted for certain sales and transactions, including sales of Okolehao and fruit wine manu-

factured in Hawaii, until June 30, 1981. But the exemption does not apply to sales of fruit liqueurs and sake manufactured locally.

In their complaints for refunds, Taxpayers allege that the Hawaii Liquor tax is unconstitutional in that it violates the Import-Export Clause and the Commerce Clause of the United States Constitution.

The Court does not agree with the Taxpauers' contentions. The Court finds the liquor tax as administered under the provisions of HRS Chapter 244 to be constitutionally valid and is not violative of either the Import-Export Clause nor the Commerce Clause of the United States Constitution.

Under the United States Supreme Court's decision in Michelin Tire Co. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1975), a nondiscriminatory state tax is not an impost or duty prohibited by the Im-

port-Export Clause and is a proper state exaction. The Court has also decided in Department of Revenue of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) and in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) that a nondiscriminatory tax is not violative of the Commerce Clause of the United States Constitution, where applied to activity with a substantial nexus to the State.

The principal question addressed to the Court, therefore, is whether or not the provisions of HRS Chapter 244 are discriminatory. If the tax does not discriminate against foreign imports or against interstate or foreign commerce, the tax would be valid under both the Import-Export Clause and the Commerce Clause of the United States Constitution.

HRS section 244-4 imposes the Hawaii liquor tax upon every person who sells or uses any liquor in the State. It essentially provides that the tax is imposed upon the first sale or use of the liquor within the State of Hawaii. The tax so imposed is equal to 20 percent of the wholesale price of the liquor used or sold.

HRS section 244-4(6) and (7) exempt Okolehao and fruit wine manufactured in Hawaii from imposition of the tax. The exemption, however, extends only until June 30, 1981.

Taxpayers pose two arguments in support of their contention that the Hawaii liquor tax is discriminatory. In the first, Taxpayers argue that the tax discriminates against all imported liquor because the dollar amount of taxes imposed upon imported liquor is greater than the dollar amount imposed upon locally manufactured liquor.

The Court rejects this argument. The mere fact that the dollar amount of taxes paid upon one item may be higher than another does not *per se* make the tax a discriminatory one. The difference in the exaction may be attributed, as in the case at bar, to the fact that imported liquors have a higher tax base because of their added landing costs.

The nondiscriminatory nature of the tax herein imposed is evidenced by the fact that the tax is imposed at a flat rate of 20 percent of the wholesale price of all liquor so used or sold, whether local or imported. It is a commonplace occurrence that any item "imported" from any place outside Hawaii will generally have a higher cost than one produced locally. The fact that this causes such items brought into Hawaii to result in a greater amount of tax does not make the tax discriminatory. In

Re Tax Appeal, Puna Sugar Co., 56 Haw. 621 (1976); Michelin Tire Co. v. Wages, supra.

Taxpayers' second argument is that the tax discriminates by exempting locally produced Okolehao and fruit wine until June 30, 1981. This they say has the effect of taxing only liquor brought into Hawaii while relieving locally produced liquor from the tax. The Court finds this argument without merit.

Exemptions are the proper exercise of the police powers of the state and are valid, unless applied with no rational basis. In Re Pacific Marine & Supply Co., 55 Haw. 572 (1974); Allied Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959).

In allowing the exemptions to the Okolehao and fruit wine industries, our Legislature has found that the exemptions would help to put these budding industries on a firmer financial footing and that the exemptions would benefit the State by providing

a new industry. Act 39, Session Laws of Hawaii, 1976; Senate Stan. Com. Rep. 408-76. The Court finds the legislative purpose provides a rational basis for the exemptions and there was no arbitrary action taken by the Legislature in granting the exemptions. This is all the Court can do. In Re Pacific Marine & Supply Co., supra, at 582.

It is also interesting to note that the Taxpayers argue that the exemptions have the effect of the liquor tax being applied only to liquor brought in to Hawaii while relieving all locally produced liquor from the tax. But the argument overlooks the fact that locally produced sake and fruit liqueurs are not exempted by Chapter 244, HRS. Two classes of liquors produced in Hawaii, then, are still subject to the tax.

IT IS ACCORDINGLY HEREBY ORDERED, ADJUDGED AND DECREED that the Hawaii liquor tax as imposed by Chapter 244, Hawaii Revised Statutes, is a valid State tax and the amounts of taxes herein paid are valid government realizations. Judgment is entered in favor of George Freitas, Director of the Department of Taxation, State of Hawaii, and against the herein Taxpayers.

Dated: Honolulu, Hawaii, January 29, 1980.

/s/ Yasutaka Fukushima
Judge of the above-entitled Court

DECISION AND ORDER, TAX APPEALS OF BACCHUS IMPORTS, LTD. (CASE NO. 1852), PARADISE BEVERAGES, INC. (CASE NO. 1862), EAGLE DISTRIBUTORS, INC. (CASE NO. 1866), AND FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS CO. (CASE NO. 1867).

APPROVED AS TO FORM:

____
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Cronin, Fried, Sekiya,
Haley & Kekina
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Honolulu, Hawaii 96813

Attorney for Plaintiffs
BACCHUS IMPORTS, LTD. and
EAGLE DISTRIBUTORS, INC.

/s/ Michael K. Kawahara
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Honolulu, Hawaii 96813

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Attorneys for Plaintiff
FOREMOST-McKESSON, INC, dba
McKESSON WINE & SPIRITS CO.

APPENDIX C

NO. 7802

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

<table>
<tr><td>In the Matter of
the Tax Appeals

of

BACCHUS IMPORTS, LTD.,
PARADISE BEVERAGES,
INC., EAGLE DISTRI-
BUTORS, INC. and
FOREMOST-McKESSON,
INC., dba McKESSON
WINE & SPIRITS, CO.,

Plaintiffs-Appellants.</td><td>CASE NO. 1852
CASE NO. 1862
CASE NO. 1866
CASE NO. 1867

APPEALS FROM
FINDING OF
FACT AND CON-
CLUSIONS OF
LAW AND JUDG-
MENT

TAX APPEAL
COURT

HONORABLE
YASUTAKA
FUKUSHIMA,
Judge</td></tr>
</table>

JUDGMENT ON APPEAL

FILED
1983 Jan. 5
/s/ Clement J.H. Chun
CLERK SUPREME
COURT

T. BRUCE HONDA 690
Deputy Attorney General
State of Hawaii
Room 305, Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

Attorney for Director of Taxation, Appellee

NO. 7802

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

In the Matter of the Tax Appeals of BACCHUS IMPORTS, LTD., PARADISE BEVERAGES, INC., EAGLE DISTRIBUTORS, INC. and FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS, CO., Plaintiffs-Appellants.	CASE NO. 1852 CASE NO. 1862 CASE NO. 1866 CASE NO. 1867 APPEALS FROM FINDING OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT TAX APPEAL COURT HONORABLE YASUTAKA FUKUSHIMA, Judge

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed December 23, 1982, the judgment of the Tax Appeal court is affirmed.

DATED: Honolulu, Hawaii, Jan. 5, 1983.

BY THE COURT:

/s/ Clement J.H. Chun
Clerk

APPROVED:

/s/ Edward H. Nakamura
Justice

APPENDIX D

NO. 7802

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

BACCHUS IMPORTS, LTD., Plaintiff-Appellant, and	CASE NO. 1852 APPEAL BY BACCHUS IMPORTS, LTD. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
PARADISE BEVERAGES, INC. Plaintiff-Appellant, and	CASE NO. 1862 APPEAL BY PARADISE BEVERAGES, INC. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
EAGLE DISTRIBUTORS, INC. Plaintiff-Appellant, and	CASE NO. 1866 APPEAL BY EAGLE DISTRIBUTORS, INC FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS, CO., Plaintiff-Appellant,	CASE NO. 1867 APPEAL BY FOREMOST-McKESSON, INC. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
vs.	TAX APPEAL COURT

GEORGE FREITAS, Director of Taxation, Defendant-Appellee	HONORABLE YASUTAKA FUKUSHIMA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

AND

CERTIFICATE OF SERVICE

ALLAN S. HALEY 982-0
410 Spring Street
Nevada City, CA 95959

of Counsel:
CRONIN, FRIED, SEKIYA, HALEY & KEKINA

Attorney for Appellants: Bacchus Imports, Ltd. and Eagle Distributors, Inc.

FILED
1983 MARCH 3

/s/ Clement J. H. Chun
CLERK SUPREME COURT

NO. 7802

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

BACCHUS IMPORTS,	)	CASE NO. 1852
LTD.,	)	
	)	APPEAL BY BACCHUS
Plaintiff-	)	IMPORTS, LTD. FROM
Appellant,	)	DECISION AND ORDER
	)	FILED ON JANUARY
and	)	29, 1980
	)	
PARADISE BEVERAGES,	)	CASE NO. 1862
INC.	)	
	)	APPEAL BY PARADISE
Plaintiff-	)	BEVERAGES, INC.
Appellant,	)	FROM DECISION AND
	)	ORDER FILED ON JAN-
and	)	UARY 29, 1980
	)	
EAGLE DISTRIBUTORS,	)	CASE NO. 1866
INC.	)	
	)	APPEAL BY EAGLE
Plaintiff-	)	DISTRIBUTORS, INC
Appellant,	)	FROM DECISION AND
	)	ORDER FILED ON JAN-
and	)	UARY 29, 1980
	)	
FOREMOST-McKESSON,	)	CASE NO. 1867
INC., dba McKESSON	)	
WINE & SPIRITS, CO.,	)	APPEAL BY FOREMOST-
	)	McKESSON, INC. FROM
Plaintiff-	)	DECISION AND ORDER
Appellant,	)	FILED ON JANUARY 29,
	)	1980
	)	
vs.	)	TAX APPEAL COURT
	)	

GEORGE FREITAS, Director of Taxation, Defendant-Appellee	)	HONORABLE YASUTAKA FUKUSHIMA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Bacchus Imports, Ltd., and Eagle Distributors, Inc., the Taxpayers-Appellants named above, hereby give notice of their appeal and appeals, pursuant to 28 U.S.C. Section 1257(2), to the Supreme Court of the United States from the judgment of the Supreme Court of Hawaii entered in this action on January 5, 1983, and each and every part thereof.

DATED: Nevada City, California, February 28, 1983

/s/ Allan S. Haley
ALLAN S. HALEY

Attorney for appellants Bacchus Imports, Ltd. and Eagle Distributors, Inc.

NO. 7802

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

BACCHUS IMPORTS, LTD.,	)	CASE NO. 1852
Plaintiff-Appellant,	)	APPEAL BY BACCHUS IMPORTS, LTD. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
and	)	
PARADISE BEVERAGES, INC.	)	CASE NO. 1862
Plaintiff-Appellant,	)	APPEAL BY PARADISE BEVERAGES, INC. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
and	)	
EAGLE DISTRIBUTORS, INC.	)	CASE NO. 1866
Plaintiff-Appellant,	)	APPEAL BY EAGLE DISTRIBUTORS, INC FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
and	)	
FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS, CO.,	)	CASE NO. 1867
Plaintiff-Appellant,	)	APPEAL BY FOREMOST-McKESSON, INC. FROM DECISION AND ORDER FILED ON JANUARY 29, 1980
vs.	)	TAX APPEAL COURT

GEORGE FREITAS, Director of Taxation,	)	HONORABLE YASUTAKA FUKUSHIMA
Defendant-Appellee	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was duly served on all parties required to be served by placing copies of the same in the United States mail, first-class postage prepaid, properly addressed, on February 28, 1983, to the following:

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Deputy Attorney General
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Of Counsel
Case, Kay & Lynch

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Attorneys for Plaintiff-Appellant McKESSON WINE & SPIRITS, CO.

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/s/ Allan S. Haley
ALLAN S. HALEY

Attorney for Appellants:
BACCHUS IMPORTS, LTD.
and EAGLE DISTRIBUTORS,
INC.

No. 82-1565

In The

Supreme Court of the United States

October Term, 1983

BACCHUS IMPORTS, LTD. and
EAGLE DISTRIBUTORS, INC.,

Appellants,

vs.

GEORGE FREITAS, Director of Taxation
of the State of Hawaii,

Appellee.

APPEAL FROM THE SUPREME COURT OF HAWAII

JOINT APPENDIX

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APPEAL DOCKETED MARCH 15, 1983
PROBABLE JURISDICTION NOTED JUNE 20, 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

INDEX

No. 82-1565

In The

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October Term, 1983

BACCHUS IMPORTS, LTD. and
EAGLE DISTRIBUTORS, INC.,

Appellants,

vs.

GEORGE FREITAS, Director of Taxation
of the State of Hawaii,

Appellee.

APPEAL FROM THE SUPREME COURT OF HAWAII

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	Proceedings
	In the Tax Appeal Court: No. 1852
1979 June 29	**Complaint of Bacchus Imports, Ltd.**
1979 July 18	**Answer to Complaint of Bacchus**
1979 August 20	**Stipulation of Facts as to Bacchus**
1979 October 25	**Stipulation for Consolidation**

In the Tax Appeal Court: No. 1862

1979	August 27	Complaint of Paradise Beverages, Inc.
1979	August 30	Answer to Complaint of Paradise Beverages
1979	October 25	Stipulation for Consolidation

In the Tax Appeal Court: No. 1866

1979	September 27	Complaint of Eagle Distributors, Inc.
1979	October 10	Answer to Complaint of Eagle Distributors
1979	October 25	Stipulation for Consolidation

In the Tax Appeal Court: No. 1867

1979	September 28	Complaint of Foremost-McKesson, Inc.
1979	October 10	Answer to Complaint of Foremost-McKesson
1979	October 25	Stipulation for Consolidation

In the Tax Appeal Court:
Nos. 1852, 1862, 1866 and 1867

1979	November 2	Stipulation of Facts as to Paradise Beverages
1979	November 7	Stipulation of Facts as to Foremost-McKesson
1979	November 20	Concurrent Opening Briefs (for all parties)
1979	December 19	Stipulation Amending Complaints in Nos. 1852, 1866 and 1867
1979	December 20	Concurrent Closing Briefs (for all parties)
1979	December 21	Stipulation of Facts as to Eagle Distributors

1980	January 21	Memorandum of Objections by Bacchus and Eagle to Proposed Decision and Order
1980	January 29	Order Overruling Objections; Decision and Order in favor of State of Hawaii
1980	February 7	Notice of Appeal by Bacchus and Eagle
1980	February 14	Notice of Appeal by Foremost-McKesson
1980	February 26	Notice of Appeal by Paradise

In the Hawaii Supreme Court: No. 7802

1980	March 24	Record on Appeal
1980	June 20	Opening Brief of Foremost-McKesson
1980	August 22	Opening Brief of Bacchus and Eagle
1980	August 25	Joinder in Opening Briefs by Paradise
1980	December 22	Answering Brief
1981	February 20	Reply Briefs of Bacchus, Eagle and Foremost-McKesson
1982	August 12	Case argued and submitted
1982	December 23	Opinion of the Court affirming the Tax Appeal Court
1983	January 5	Judgment of Appeal
1983	March 3	Notice of Appeal filed by Bacchus and Eagle
1983	March 15	Appeal Docketed in U. S. Supreme Court
1983	June 20	Probable Jurisdiction Noted

WHAT MAY BE FOUND IN THE APPENDIX TO THE JURISDICTIONAL STATEMENT

Of Counsel:

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HALEY & KEKINA

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Tel. No. 524-1433

Attorney for Bacchus Imports,
Ltd. and Eagle Distributors

IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

CASE NO. 1852

STIPULATION OF FACTS IN NO. 1866 AND ORDER

BACCHUS IMPORTS, LTD.,

Plaintiff,

vs.

GEORGE FREITAS, Director of Taxation,

Defendant.

CASE NO. 1862

PARADISE BEVERAGES, INC.,

Plaintiff,

vs.

GEORGE FREITAS, Director of Taxation,

Defendant.

CASE NO. 1866

EAGLE DISTRIBUTORS, INC.,

Plaintiff,

vs.

GEORGE FREITAS, Director of Taxation,

Defendant.

CASE NO. 1867

FOREMOST-McKESSON, INC., dba McKESSON WINE & SPIRITS, CO.,

Plaintiff,

vs.

GEORGE FREITAS, Director of Taxation,

Defendant.

STIPULATION OF FACTS IN NO. 1866

Plaintiff Eagle Distributors, Inc. and defendant George Freitas herewith stipulate to the following facts which may be deemed admitted and proved in this action without the submission of further evidence; provided, however, that further evidence consistent with the facts herein stipulated, or other evidence, may be introduced upon agreement of the parties.

1. Eagle Distributors, Inc. is a corporation organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii, with other places of business at Hilo, Kailua-Kona, Kahului, and

Lihue, in the State of Hawaii. It is licensed by the State of Hawaii as a wholesaler of beer and wine pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-796, and Wholesaler's Licenses for each of its locations, issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

2. Defendant George Freitas is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (Chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

3. For more than five years prior to September 27, 1979, plaintiff has filed with defendant each month as the same were due liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid the amount of tax shown on such return, in the total amount for the five year period August 1974-July 1979 of $10,744,047.00.

4. On August 31, 1979, plaintiff sent to defendant together with its liquor tax return and payment for the month of July, 1979, a letter protesting that payment and all payments of such tax over the previous five years, a true copy of which is attached hereto as Exhibit A.

5. This action was commenced on September 27, 1979.

6. Plaintiff imports beer and wine into the State of Hawaii, warehouses such beer and wine on premises licensed by agencies of both the United States and the State of Hawaii, and sells such beer and wine at wholesale.

7. Beer imported into Hawaii by plaintiff is manufactured in California or one of several other States, and shipped overland to the ports of Oakland or Los Angeles for shipment by ocean freighter to plaintiff.

8. Wine imported by plaintiff into Hawaii originates in foreign countries and is first cleared through United States Customs at Honolulu, Hawaii.

9. All of such wine and beer is imported in the cartons or cases in which it was originally packed and shipped, and when sold by the case is sold by plaintiff in such original cartons or cases. Beer is sold only by the case; wine is occasionally sold by the bottle or withdrawn as a sample, and is pulled for such occasion from the case in which it was shipped or from the shelves in plaintiff's warehouses reserved for storage of less than full cases.

10. Such wine and beer is purchased by plaintiff before its arrival in Honolulu from its producer or from the agent of its producer.

11. Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage markup to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:

(1) Inland freight to the port of shipment to Honolulu;

(2) Container and wharfage charges at the port of loading, as charged by the shipping company;

(3) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);

(4) Wharfage fees at Honolulu;

(5) Drayage charges for transportation to plaintiff's warehouse;

(6) Customs brokerage fees;

(7) Customs duties and internal revenue taxes as applicable; and

(8) Warehouse handling charges.

12. Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

13. Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

14. The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; sake, various flavored fruit liqueurs; and a fruit wine made from pineapple. At present, all of Hawaii's commercially available whisky, gin, rum, vodka, and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor

Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

15. After imposition of the 20% Hawaii Liquor Tax, imported wines and spirits (particularly champagne, whose federal duty and tax rate is approximately ten times that of still wine) are rendered more expensive than comparable domestic products, all other things being equal.

16. The Hawaii Liquor Tax, in effect, places a heavier tax on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii, so that for example, wines from France (halfway around the world from Hawaii) are taxed significantly more than their equivalents produced in and imported from California.

17. The effect of the tax in this regard can be illustrated simply by showing the net result on the price to the customer of an increase of $1.00 in the cost (F.O.B. the winery) of a bottle of French, Californian, and Hawaiian wine, respectively. In a typical case, for every dollar of increase in the cost of a French wine, the Hawaii consumer will end up paying $3.23 more; in the case of a California wine, he will pay $2.38 more, while in the case of a Hawaiian wine, he will pay only $1.91 more. These represent increases of 223%, 138% and 91%, respectively, with the most burdensome increase being borne by the foreign import, and the next most burdensome increase being borne by the domestic import. Of these increases, the portion represented by the Hawaii Liquor Tax is $.65, $.47 and $.00, respectively.

18. Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale wine and malt beverages.

19. Exhibit K to the Stipulations in Case No. 1852 is a true copy of pages 9-13 of a publication, "1978 Tax Briefs", compiled by the Distilled Spirits Council of the United States and published in 1979. It gives in summary form the amounts of the gallonage taxes on distilled spirits, wine and beer imposed as of 1978 by the 32 states (and the District of Columbia) which have, like Hawaii, a licensing system to control the importation of liquor. (The other 18 states have state monopoly systems, in which the state imports and sells all liquor itself and takes a specified markup to include both profit and taxes.)

DATED: Honolulu, Hawaii, December 20, 1979.

Stuart A. Kaneko
for ALLAN S. HALEY
Attorney for Bacchus and Eagle

Allan S. Chock
Attorney for Freitas

Approved and so Ordered:

/s/ Yasutaka Fukushima
Judge of the above entitled court

(Caption Omitted)

CASE NO. 1852

STIPULATION OF FACTS

Plaintiff and defendant hereby stipulate to the following facts which may be deemed admitted and proved in this action without the submission of further evidence; provided, however, that further evidence consistent with the facts herein stipulated, or other evidence, may be introduced upon agreement of the parties.

1. Bacchus Imports, Ltd. is a corporation, organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii. It is licensed by the State of Hawaii as a wholesaler of beer and wine pursuant to § 281-31 of the Hawaii Revised Statutes (1968), as amended, and as a permittee pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-841, and a Wholesaler's License No. HI-P-2946. issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

2. Defendant George Freitas is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (Chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

3. Beginning on or about January 30, 1978, plaintiff has filed with defendant each month as the same were due

liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid the amount of tax shown on such return, in the total amount of $75,060.22. Exhibits A through I attached are true and correct copies of such tax returns filed by plaintiff up to the time of commencement of this action.

4. On May 30, 1979, plaintiff sent to defendant, together with its liquor tax return and payment for the month of April 30, 1979, a letter protesting that payment and all previous payments of such tax, a true copy of which is attached hereto as Exhibit J.

5. This action was commenced on June 29, 1979.

6. Plaintiff imports wine and beer into the State of Hawaii, warehouses such wine and beer on premises licensed by agencies of both the United States and the State of Hawaii, and sells such wine and beer at wholesale.

7. Wine and beer imported into Hawaii by plaintiff comes into the State via three different routes:

(1) Wine and beer originating in foreign countries whose first port of entry under the United States Customs laws is Honolulu, Hawaii;

(2) Wine and beer originating in foreign countries whose first port or place of entry under the United States Customs laws is a port or place other than Honolulu, Hawaii; and

(3) Wine and beer originating in one of the forty-nine other States of the United States.

8. All of such wine and beer is imported in the cartons or cases in which it was originally packed and

shipped, and when sold by the case is sold by plaintiff in such original cartons or cases. Beer is sold only by the case; wine is occasionally sold by the bottle or withdrawn as a sample, and is pulled for such occasion from the case in which it was shipped or from the shelves in plaintiff's warehouses reserved for storage of less than full cases.

9. Wine and beer whose first customs port of entry is Honolulu is purchased by plaintiff from its foreign producer or shipper, or from the agent of such foreign producer or shipper, and is received in Honolulu at Pier 39, Foreign Trade Zone No. 9, which is a duly authorized foreign trade zone pursuant to Title 19, Chapter 1A of the United States Code. It is unloaded and stored in bond in either plaintiff's own leased area within such Zone or in the general public storage area operated by the Zone itself. Customs duties on such wine and beer are not paid until the wine or beer is subsequently withdrawn from such bonded storage.

10. Wine and beer first brought into the United States at a place other than Honolulu is imported (and duty on it is paid) by an importer other than plaintiff. Plaintiff subsequently purchases such wine or beer from such primary importer and has it shipped to Honolulu, where it is stored in plaintiff's non-bonded storage facilities until sold or otherwise used.

11. Wine and beer originating in one of the other states of the United States is purchased by plaintiff from its producer or from the agent of its producer and is shipped and stored in the same manner described in paragraph 11 above.

12. Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage mark-up to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:

(1) Inland freight to the port of shipment to Honolulu;

(2) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);

(3) Wharfage fees at Honolulu;

(4) Drayage charges for transportation to plaintiff's warehouse;

(5) Customs brokerage fees;

(6) Customs duties and internal revenue taxes; and

(7) Warehouse handling charges.

13. Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

14. Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number

of plaintiff's customers take more than thirty days to pay their bills.

15. The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; various flavored fruit liquers; sake; and a fruit wine made from pineapple. At present, all of Hawaii's commercially available whisky, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

16. After imposition of the 20% Hawaii Liquor Tax, imported wines and spirits (particularly champagne, whose federal duty and tax rate is approximately ten times that of still wine) are rendered more expensive than comparable domestic products, all other things being equal.

17. The Hawaii Liquor Tax, in effect, places a heavier tax on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii, so that for example, wines from France (halfway around the world from Hawaii) are taxed significantly more than their equivalents produced in and imported from California.

18. The effect of the tax in this regard can be illustrated simply by showing the net result on the price to the consumer of an increase of $1.00 in the cost (F. O. B. the winery) of a bottle of French, Californian, and Hawaiian wine, respectively. In a typical case, for every dollar of increase in the cost of a French wine, the Hawaii consumer will end up paying $3.23 more; in the case of a

California wine, he will pay $2.38 more, while in the case of a Hawaiian wine, he will pay only $1.91 more. These represent increases of 223%, 138% and 91%, respectively, with the most burdensome increase being borne by the foreign import, and the next most burdensome increase being borne by the domestic import. Of these increases, the portion represented by the Hawaii Liquor Tax is $.65, $.47 and $.00, respectively.

19. Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale wine and malt beverages.

20. Exhibit K attached is a true copy of pages 9-13 of a publication, "1978 Tax Briefs", compiled by the Distilled Spirits Council of the United States and published in 1979. It gives in summary form the amounts of the gallonage taxes on distilled spirits, wine and beer imposed as of 1978 by the 32 states (and the District of Columbia) which have, like Hawaii, a licensing system to control the importation of liquor. (The other 18 states have state monopoly systems, in which the state imports and sells all liquor itself and takes a specified markup to include both profit and taxes.)

DATED: Honolulu, Hawaii, August 20, 1979.

/s/ Allan S. Haley
Attorney for Plaintiff

/s/ Allan S. Chock
Attorney for Defendant

APPENDIX A

(Caption Omitted)

CASE NO. 1867

STIPULATION OF FACTS

Plaintiff and defendant hereby stipulate to the following facts which may be deemed admitted and proved in this action without the submission of further evidence; provided, however, that further evidence consistent with the facts herein stipulated, or other evidence, may be introduced upon agreement of the parties.

1. FOREMOST-McKESSON, INC., is a Maryland corporation registered to do business in the State of Hawaii, and doing business as McKESSON WINE & SPIRITS CO., a division of FOREMOST-McKESSON, INC. It is licensed by the Liquor Commission for each County of the State of Hawaii as a liquor wholesaler (General License) pursuant to Hawaii Rev. Stat. § 281-31 (1976 Repl.) and by the Department of Taxation for the State of Hawaii as a permittee pursuant to Hawaii Rev. Stat. § 244-2 (1976 Repl.). It also holds an importer's License and a Wholesaler's License for each County of the State of Hawaii issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to 27 U.S.C. § 204.

2. Defendant GEORGE FREITAS is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (Hawaii Rev. Stat. §§ 244-1 *et seq.* [1976 Repl.] hereinafter referred to as "the Liquor Tax Law").

3. Since 1939, Plaintiff has each month, as the same were due, filed liquor tax returns with Defendant and his predecessors in office through the State Tax Collector for each District Office of the Department of Taxation, and has each month paid the amount of tax shown on such return. The total amount of such payments made from September 30, 1974 to date exceeds $26,000,000.00.

4. On September 6, 1979, Plaintiff sent to the State Tax Collector for each District Office of the Department of Taxation of the State of Hawaii a letter, together with its liquor tax return and payment for the month of August, 1979, protesting said payment and all previous payments of such tax, true copies of which are attached to the Complaint filed herein as Exhibits "A", "B", "C", and "D". Plaintiff has also submitted identical letters of protest with every liquor tax return filed as the same were due for each month subsequent to August 1979.

5. This action was commenced on September 29, 1979 within thirty days from the date of such payments and protests.

6. Plaintiff imports liquor (as that term is defined in Hawaii Rev. Stat. § 281-1 (1976 Repl.)) into the State of Hawaii, warehouses such liquor on premises licensed by agencies of both the United States and the State of Hawaii, and sells such liquor at wholesale.

7. Liquor imported into Hawaii by Plaintiff comes into the State via three different routes:

(1) Liquor originating in foreign countries whose first port of entry under the United States Customs laws is Honolulu, Hawaii;

(2) Liquor originating in foreign countries whose first port or place of entry under the United States Customs laws is a port or place other than Honolulu, Hawaii; and

(3) Liquor originating in one of the forty-nine other States of the United States.

8. All such liquor is imported in the cartons or cases in which it was originally packed and shipped, and when sold by the case it is sold by Plaintiff in such original cartons or cases. Beer is sold only by the case; wine is generally sold by the case, but is also sold by the bottle, and other liquors are sold by the case and by the bottle. When wine and other liquors are sold by the bottle, they are pulled for such occasion from the case in which they were shipped or from the shelves in Plaintiff's warehouses reserved for storage of less than full cases.

9. Wine and beer whose first customs port of entry into the United States is Honolulu are purchased by Plaintiff from its foreign producer or shipper, or from the agent of such foreign producer or shipper, and are received in Honolulu at Fort Armstrong or Pier 51A. Customs duties on such wine and beer are paid by Plaintiff upon receipt at Fort Armstrong or Pier 51A.

10. Liquors other than wine and beer (i. e., brandy, whiskey, rum, gin, vodka and other spirits) whose first customs port of entry into the United States is Honolulu are purchased by Plaintiff from its foreign producer or shipper, or from the agent of such foreign producer or shipper, are received at Fort Armstrong or Pier 51A and are transported to Plaintiff's warehouse where they are unloaded and stored in bond. Customs duties on such

liquors are not paid until they are subsequently withdrawn from such bonded storage.

11. Liquor whose first customs port of entry into the United States is a place other than Honolulu is imported (and duty on it is paid) by an importer other than Plaintiff. Plaintiff subsequently purchases such liquor from such primary importer and has it shipped to Honolulu, where it is stored in Plaintiff's non-bonded storage facilities until sold or otherwise used. The purchase price of such liquor includes the customs duties paid by the primary importer.

12. Liquor originating in one of the other states of the United States is purchased by Plaintiff from its producer or from the agent of its producer and is shipped and stored in the same manner described in Paragraph 11 above.

13. Plaintiff's "wholesale price" for liquor imported by it is determined by adding a percentage markup to its "landed cost" for such liquor. Plaintiff's landed cost for such liquor is determined by adding to its original (F. O. B.) cost in dollars the following costs:

(1) Inland freight to the port of shipment to Honolulu;

(2) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);

(3) Wharfage fees at Honolulu;

(4) Drayage charges for transportation to Plaintiff's warehouse;

(5) Warehouse handling charges;

(6) Customs brokerage fees;

(7) United States internal revenue service (gallonage) taxes; and

(8) United States customs duties.

14. Plaintiff sells liquor in the State of Hawaii to licensees and others who are by law authorized to resell but are not by law required to hold a license (i. e., military post exchanges) at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Hawaii Rev. Stat. § 237-13 (1978 Supp.).

15. Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not Plaintiff's customers have paid their invoices as of that date. A number of Plaintiff's customers take more than thirty days to pay their bills.

16. The only liquors manufactured commercially in Hawaii are okolehao, a type of whiskey distilled from the native ti plant; various flavored fruit liquers; sake, a beer made from rice; and a fruit wine made from pineapple. At present, all of Hawaii's commercially available whiskey, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer (except for sake) are imported into the State. The Liquor Tax Law

exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

17. After imposition of the 20% Hawaii Liquor Tax, imported liquor (particularly champagne, whose federal duty and tax rate is approximately ten times that of still wine) are rendered more expensive than comparable domestic products, all other things being equal.

18. The Hawaii Liquor Tax, in effect, places a heavier tax on those imports which come from the farthest away. It does this by adding a surcharge of twenty per-cent to the cost of freight to bring the imported liquor to Hawaii, so that for example, wines from France (halfway around the world from Hawaii) are taxed significantly more than their equivalents produced in and imported from California.

19. The effect of the Hawaii Liquor Tax can be illustrated simply by showing the net result on the price to the consumer of an increase of $1.00 in the cost (F. O. B. the winery) of a bottle of French, California, and Hawaiian wine, respectively. In a typical case, for every dollar of increase in the cost of a French wine, the Hawaii consumer will end up paying $3.23 more; in the case of a California wine, he will pay $2.38 more, while in the case of a Hawaiian wine, he will pay only $1.91 more. These represent increases of 223%, 138% and 91%, respectively, with the most burdensome increase being borne by the foreign import, and the next most burdensome increase being borne by the domestic import. Of these increases, the portion represented by the Hawaii Liquor Tax is $.65, $.47, and $.00, respectively.

20. Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale liquor beverages.

DATED: Honolulu, Hawaii, Nov. 7, 1979.

/s/Bruce C. Bigelow
Michael R. Marsh
Attorneys for Plaintiff

/s/ Allan S. Chock
Attorney for Defendant

NO. 82-1565

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,
Appellants,
v.
GEORGE FREITAS,
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Director of Taxation, State of Hawaii, moves the Court to dismiss the herein appeal, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Hawaii on the ground that the questions presented by the Appellants are so unsubstantial as not to need further argument.

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A. The Statute.

This appeal raises the question of the validity of that provision of the Hawaii Liquor Tax Law which exempts okolehao and certain fruit wines manufactured in the State from imposition of the liquor tax (Section 244-4, Hawaii Revised Statutes).

The Hawaii Liquor Tax Law, Chapter 244, Hawaii Revised Statutes, imposes an excise tax[1] upon the sale or use of liquor in the State. The tax is imposed upon the first sale of the liquor in the State and is imposed only once upon the same liquor. The tax is assessed in an amount equal to twenty per cent of the wholesale price. By Section 244-4, the Hawaii State Legislature has exempted from the tax certain expressly enumerated transactions among which are the sale and use of okolehao manufactured in the State and fruit wine manufactured in the State from products grown in the State. In the case of okolehao, the exemption was allowed for the period from May 17, 1971 to June 30, 1981 and for fruit wine the period of the exemption extended from May 17, 1976 to June 30, 1981. Okolehao and fruit wine are not the only alcoholic beverages manufactured in Hawaii. Fruit liqueurs and sake, a Japanese rice wine, are also manufactured in the State the sale of which, however, are not exempted from the tax.

B. The Proceedings Below.

The Appellants[2] are wholesalers of liquor who were made to pay the taxes imposed by the Hawaii Liquor Tax Law. During the period the exemptions were still in effect, the Appellants paid the taxes under protest and filed their complaint for the recovery thereof.

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[1] The Appellants characterize the tax as an *ad valorem* tax although the tax is clearly characterized as an excise tax. In its Opinion, the Hawaii Supreme Court has characterized the tax as an excise tax. The validity of the tax is to be determined by its practical effect and not by the formal language of the statute. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, at 279.

[2] The Appellants in the appeal to the United States Supreme Court are Bacchus Imports, Ltd. and Eagle Distributors, Inc. The appeals of two other wholesalers, Foremost-McKesson, Inc. and Paradise Beverages were consolidated for disposition in the courts of the State of Hawaii but have not joined in this appeal.

Appellants challenge the validity of the assessments upon constitutional grounds by asserting that, because the exemptions are allowed only to okolehao and fruit wine manufactured in the State from products grown in the State, the statute contravenes the Equal Protection (14th Amendment, Section 1), Commerce (Article I, Section 8, Clause 3) and Import-Export (Article I, Section 10, Clause 2) Clauses of the United States Constitution and the Equal Protection (Article I, Section 5) Clause of the Constitution of the State of Hawaii. The Tax Appeal Court of the State of Hawaii, by decision entered January 29, 1980, upheld the validity of the statute and denied the Appellants the relief sought. Upon appeal to the Supreme Court of the State of Hawaii, the decision of the lower court was affirmed by its Opinion entered on December 23, 1982, 65 Haw. ___, (1982). The Court held: "Though we have carefully scrutinized the statute with the cited constitutional provisions in mind, we discern no infirmities in HRS 244-4."

II. ARGUMENT.

The Case Presents No Substantial Question Not Previously Decided By This Court.

1. The Hawaii Liquor Tax Law Does Not Deny Equal Protection of the Laws.

A state tax statute which incorporates a scheme of classification by exempting some, but not others, from the tax is neither arbitrary nor violative of the Equal Protection Clause where a rational relationship exists between the classification and the achievement of a valid legislative purpose. *Vance v. Bradley*, 440 U.S. 93 (1979) at 97. Whether or not the challenged classification is rationally related to the achievement of a legitimate state purpose is to be answered by the two questions:

"(1) Does the challenged legislation have a legitimate state purpose?

"(2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?"

Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981) at 668.

Lawmakers are under no obligation to convince the courts of the correctness of their legislative judgment. It is only necessary that they rationally could have believed that the classification would promote their objectives. *Western & Southern Life Insurance Company v. Board of Equalization, supra; Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). In the field of taxation, the lawmakers possess the greatest latitude in promulgating classifications. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Madden v. Kentucky,* 309 U.S. 83 (1940). The Fourteenth Amendment was not intended to compel the states to adopt an ironclad rule of equal taxation. *Bell's Gap Railroad Co. v. Pennsylvania,* 134 U.S. 232 (1890). The encouragement of local industries by exempting them from taxation, though not others, is neither arbitrary nor violative of the Equal Protection Clause. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959). Where the legislature has granted an exemption, the presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is hostile and oppressively discriminates against particular persons and classes. The burden then is upon the one attacking the classification to negate every conceivable basis which might support it. *Madden v. Kentucky, supra.*

In the case at bar the exemption was accorded to manufacturers of okolehao for the purpose of encouraging and promoting the establishment of a new industry. Act 26,

Session Laws of Hawaii 1960, Senate Standing Committee Report No. 87, Senate Journal Special Session 1960 at 224. The exemption accorded to manufacturers of fruit wine from products grown in the State is for the purpose of stimulating the local fruit wine industry. Act 39, Session Laws of Hawaii, 1976, Senate Standing Committee Report No. 408-76, Senate Journal 1976 at 1056. The legislative expressions establish that the lawmakers rationally believed that the exemptions would promote their declared objectives. The presumption of its constitutionality, therefore, must be overcome only by the most explicit demonstration of its oppressive hostility and the absence of any conceivable basis to support the exemption. The Appellants have failed to meet their burden in this regard. They have not introduced any evidence, nor have they made any attempt, to controvert this legislative belief. In their Statement of Jurisdiction, the Appellants concede there is no dispute as to the State law or its interpretation, accordingly, the Appellants accept the rationality and purpose underlying the granting of these exemptions. After reviewing the Appellants allegations, the Hawaii Supreme Court has determined that the "statute does not establish a classificatory scheme that disfavors any of the taxpayers . . . all wholesalers of liquor distributing alcoholic beverages in Hawaii are subject to taxation thereunder in similar fashion."

In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the Court held it inherent in the exercise of its power to tax that a state is free to select the subjects of taxation and to grant exemptions and that inequalities which result from singling out of one particular class from taxation or exemption infringes no constitutional limitation. See, also, *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947).

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) is

not apposite hereto. The Ohio statute imposed an *ad valorem* property tax upon accounts receivables of foreign corporations doing business in the State. The receivables were not used in the conduct of business in the State but were used by the foreign corporations in their general business. Accounts receivables of a similar nature owned by residents and domestic corporations were exempt from the tax. The tax was determined to deny equal protection of the laws because the tax was premised purely upon the residency status of the taxpayers. The reciprocity feature of the Ohio statute was determined insufficient to save the statute from the constitutional infirmity.

2. **The Statute Does Not Impose An Impermissible Burden Upon Interstate Commerce.**

Whether or not a State tax impermissibly impinges upon interstate commerce is to be evaluated under the four-part test enounced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), at 279:

> "These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

The Hawaii Liquor Tax comports with these requirements. The tax is imposed upon the wholesaling of liquor in the State and the revenues derived therefrom are used wholly for the support of general governmental services. The tax is assessed only upon the intrastate sales and uses of liquor and does not seek to obtain a share of any revenue derived from the Appellants' business activities outside the State. The tax, accordingly, has no extraterritorial effect.

The Appellants do not dispute they maintain substantial nexus with this State to justify imposition of the tax. Neither do they dispute the tax is fairly related to the services provided by the State. The Hawaii Supreme Court has determined it could perceive no basis to seriously consider the assertion the tax is not fairly apportioned inasmuch as the Appellants agree the tax is assessed only upon the intra-state sales and uses of liquor. Moreover, in light of the fact the tax has no extraterritorial effect and does not seek to obtain a share of revenues derived by the Appellants from their interstate enterprises, there is no possibility that the Appellants will be subjected to a duplicity of taxation from their interstate business activities. The Hawaii court further determined that all of the Appellants, whether incorporated domestically or in a foreign state, may engage in the business of selling liquor in the State upon an equal footing as a result whereof corporations domesticated in the State of Hawaii would gain no advantage over a corporation domesticated in a jurisdiction other than the State of Hawaii.

Where the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed upon interstate commerce is clearly excessive in relation to the benefits derived from the State. *Minnesota v. Clover Leaf Creamery Co., supra.* The burden, if any, is minor inasmuch as it has no effect upon the sale and shipment of the exempted okolehao and fruit wine in interstate commerce. The Appellants have not proven any facts to demonstrate the burden is clearly excessive. The statute, accordingly, is unlike statutes which discriminate oppressively against interstate commerce and which, as a result, have been repeatedly struck down.

Maryland v. Louisiana, 451 U.S. 725 (1981) cited by the Appellants is clearly distinguishable and not apposite

hereto. The State of Louisiana attempted to tax pipeline companies upon their first use of natural gas produced from the Outer Continental Shelf. The gas was piped to processing plants in Louisiana and thereafter sold to out-of-state customers. The tax was to be passed on to the ultimate consumers who were predominantly consumers located outside the state and the only ones to pay the tax because, by way of credits and exclusions, Louisiana customers escaped the tax. The tax was voided because it imposed an impermissible burden upon interstate commerce.

3. The Statute Does Not Contravene the Import-Export Clause.

It is not every state exaction upon foreign imports or exports that constitutes a prohibited impost or duty. The test to be applied as to whether or not a state tax constitutes a prohibited impost or duty is set forth in *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976) at pages 285-86:

> "The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."

The Hawaii Liquor Tax is imposed upon all liquor wholesalers engaged in business in the State. It applies to the sale and use of all liquor in the State whether or not the liquor is manufactured and imported from a foreign country, in any of the other forty-nine states or manufactured and sold in this State.

There is no scintilla of evidence that the tax restrains the ability of the Federal Government to conduct foreign policy or that by enactment of the tax, the Hawaii State Legislature has erected a special tariff. The Appellants, therefore, have not demonstrated the tax impedes the ability of the Federal Government to conduct foreign policy or that it impedes the regulation of foreign trade by the United States. *Department of Revenues of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) at 754. The tax is imposed upon wholly intrastate activities and the revenues are used to provide general governmental services, accordingly, the measure does not divert any Federal revenues to the State. Because of its wholly intrastate nature and that the Appellants are doing business in this State, there exist a reasonable nexus with this State. The tax is fairly apportioned because it is assessed only upon the intrastate sales and use of liquor and does not compete with any revenue derived from the Appellants interstate enterprise. The tax, therefore, is non-discriminatory in its practical effect and thereby meets the third requirement. Where the tax is levied only upon activities conducted wholly within the State, the tax is properly apportioned and multiple burdens legally cannot occur. *Department of Revenues of Washington v. Association of Washington Stevedoring Companies, supra.*

The tax, therefore, does not offend any of the three policy considerations prescribed in *Michelin, supra,* and

must be deemed a permitted tax and not a prohibited impost.

The Import-Export Clause prohibits a levy that "'intercepts the import, *as an import*, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State.'" (Emphasis theirs). *Michelin Tire Corp. v. Wages, supra*, at 297 quoting from *Brown v. Maryland*, 12 Wheat, 419, 443. Taxes imposed after an initial sale (*Waring v. The Mayor*, 8 Wall. 110 (1869)); after breaking of shipping packages (*May v. New Orleans*, 178 U.S. 496 (1900)); taxation of goods committed to current operational needs by a manufacturer (*Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959)) have been determined to be permissible levies. Cited in *Michelin v. Wages, supra*, at 287-88.

Department of Revenue v. James Beam Distilling Co., 377 U.S. 341 (1964) does not assist the Appellants. There, a Kentucky statute would have imposed a tax of ten cents per gallon on the importation of whisky into the State. The tax was deemed violative of the Import-Export Clause. However, the decision followed *Low v. Austin*, 13 Wall. 29, which was expressly overruled in *Michelin Tire Co., supra*. The case, therefore, is of no help in questions involving the Import-Export Clause.

III. CONCLUSION.

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Hawaii.

Respectfully submitted,

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May 7, 1983

No. 82-1565

In The
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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 82-1565

In The
Supreme Court of the United States
October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,

Appellants,

vs.

GEORGE FREITAS,
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR REMAND

The Appellee requests this Court to either dismiss or remand this matter for the following reasons:

1. Appellants have not borne the economic burden of the Hawaii Liquor Tax and therefore are not entitled to refund of the liquor taxes paid or other relief from this Court. Appellants have added on the amount of liquor tax to the normal wholesale selling prices of their liquors (J.A., at 9, 15 and 22). Pursuant to Hawaii Rev. Stat. § 244-5, Appellants have stated the amount of the liquor tax as a separate part of the wholesale selling price charged to liquor retailers. By separately stating the amount of liquor tax, the liquor retailer becomes respon-

sible for promptly remitting to the Appellant wholesalers the entire amount of the liquor tax or face severe penalties, including suspension of his retail liquor license. H. R. S. § 281-83. It cannot be clearer from the facts and from Hawaii's liquor tax structure that Appellants have passed on the entire amount of the liquor tax and have not borne any part of the economic burden of the tax.

2. In pertinent part, Hawaii Rev. Stat. § 244-5 provides as follows:

> "§ 244-5 Statement of tax as separate part of price. A dealer may state the amount of the tax accruing on a sale as a separate part of the price charged by him, but shall not be required to do so; however, section 281-83 shall not apply unless the amount of the tax has been so separately stated."

3. In pertinent part, Hawaii Rev. Stat. § 281-83 provides as follows:

> "§ 281-83 Payment of liquor tax to be made. When ever liquor is purchased by the holder of a retail, dispenser, club, cabaret, hotel, or vessel license from the holder of a manufacturer's or wholesale license, the amount added to the price on account of the tax imposed by chapter 244, as provided by section 244-5, shall be paid by the purchaser within twenty days after the end of the month in which the purchase has been made. On the failure to make the payment within such time the liquor commission may in its discretion suspend the license of the purchaser for a period of not more than ten days for the first failure and not more than twenty days for any subsequent failure."

4. When a taxpayer claiming a refund has not borne the economic burden of the tax, the general rule is that the taxpayer is not entitled to a refund on the grounds of

unjust enrichment.[1] The principal exception to this rule appears where the taxpayer refunds or is under contract to refund the tax to the purchasers or consumers who ultimately paid the tax, in which case there is no unjust enrichment. 119 ALR 542 (1939) *anno:* "Right as between dealer and taxing authorities in respect of taxes illegally collected." In this case, where Appellants have not refunded the tax and have no contract or agreement to refund the tax to the consumers, Appellants have no right to receive a windfall of over 100 million in tax collections paid by other persons.

5. Because Appellants have no right to receive a tax refund even if the tax is held invalid, Appellants have no standing to litigate the validity of the tax.[2] While this issue was not raised below, it is jurisdictional and therefore must be addressed by this Court before reaching the merits of this case.[3]

6. The exemptions from the liquor tax which Appellants claim give them a right to the refunds in question

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[1] 84 C.J.S., Taxation, § 632, "A taxpayer who has been otherwise compensated for the taxes paid is not entitled to a refund thereof." Cf. *Washington Plaza Associates v. State Board of Assessment Appeals,* 620 P. 2d 53 (1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson,* 286 So. 2d 529 (Fla. 1973); *F. W. Monroe Cigar Co. v. Department of Revenue,* 50 Ill. App. 3d 161 (1977); *Consolidated Distilled Products, Inc., v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1974), *appeal dismissed,* 419 U. S. 809 (1974); *State v. Obexer & Son, Inc.,* 660 P. 2d 981 (Nev. 1983).

[2] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U. S. 464 (1982); quoting *Frothingham v. Mellon,* 362 U. S. 447, 488; *North Carolina v. Rice,* 404 U. S. 244 (1971); *Simons v. Eastern Kentucky Welfare Rights Organization,* 426 U. S. 26, 37-38 (1976); *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227 (1937).

[3] *Clark v. Gray, Inc.,* 306 U. S. 583 (1939); *Tyler v. Judges of the Court of Registration,* 179 U. S. 405 (1900).

expired on June 30, 1981. Other than their claims for refund, there exists no controversy between the Appellants and the Appellee.

7. Assuming arguendo that the exemptions contained in the liquor excise tax were held to be invalid by this Court, these exemptions should be held severable from the remainder of the Hawaii Liquor Tax Law. The Hawaii legislature did not intend to jeopardize State revenues and relieve the liquor traffic in Hawaii from the Liquor Tax Law based upon its limited concern to promote insignificant aspects of the Hawaii liquor industry.[4] This issue should be resolved by this Court or remanded to the Hawaii Supreme Court for resolution.

8. In the disposition of this case, the Court below did not reach any Twenty-first Amendment issue because it found that the exemptions in question had no significant impact on either foreign or interstate commerce because of their limited nature and scope. Appellants offered no proof as to effect of the exemptions on either foreign or interstate commerce. However, if the Twenty-first Amendment means anything, it must give the States some ability to deal with liquor traffic over and above that otherwise permitted by other provisions of the Constitution. Proper disposition of this case requires a consideration of the interrelationship of the Twenty-first Amendment and the Import-Export Clause (Article I § 10, cl. 2) and the Commerce Clause (Article I § 8, cl. 3). These considerations in turn require a balancing of the State's interest in granting the exemptions in question with the effect such exemptions have on either foreign or interstate commerce. This can only be accomplished by proof which is absent

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[4]See *United States v. Jackson*, 390 U. S. 570 (1968) and cases cited therein; *Leitz v. Mealey*, 414 U. S. 33 (1941).

from this case. Under these circumstances, this Court should dismiss this case because the Appellants have failed to meet their burden of proof.

9. History of state legislation and the decisions of the Court in regard to the authority of the States to regulate and tax the liquor business dictates that the Court should give only a prospective application to any decision which would change existing state laws based on historical precedent of this Court under the Twenty-first Amendment. A prospective application of any rule under the circumstances of the present case, since the exemptions have expired, would not relate to any existing case or controversy.

For the reasons herein stated, and as more fully set forth in the Brief of the Appellee filed as of this date, it is respectfully submitted that this case should either be dismissed for lack of jurisdiction or remanded to the Court below for resolutions of issues which are relevant to its proper disposition.

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Office - Supreme Court, U.S.
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No. 82-1565

In the Supreme Court of the United States

OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC., *Appellants*,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, *Appellee*.

On Appeal from the Supreme Court
of the State of Hawaii

ON MOTION TO DISMISS OR REMAND

BRIEF FOR THE APPELLANTS IN OPPOSITION

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Table of Authorities

Cases

Constitution and Statutes

PAGE

Miscellaneous

In the Supreme Court of the United States

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BACCHUS IMPORTS, LTD., and
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OF THE STATE OF HAWAII, *Appellee.*

**On Appeal from the Supreme Court
of the State of Hawaii**

ON MOTION TO DISMISS OR REMAND

BRIEF FOR THE APPELLANTS IN OPPOSITION

The appellee's motion to dismiss or remand asks this Court to hold summarily that the claim for refund of taxes is so insubstantial that the appellant wholesalers have no chance of recovering. The arguments in the motion do not establish this point. We return to that subject below. The more important objection to the appellee's arguments, however, is that the arguments made in the motion have nothing to do with this Court's jurisdiction.

1. This case is before the Court because the appellants challenged a state statute as in violation of the United States Constitution. The Supreme Court of Hawaii considered that claim on the merits and ruled in favor of the statute's constitutionality. The appellants took a timely appeal from the decision sustaining the state statute against federal attack. The Court noted probable jurisdiction. The jurisdiction of this

Court is based firmly on 28 U. S. C. § 1257(2). The motion to dismiss the appeal does not even mention § 1257(2), and it does not contend that this case is other than a constitutional challenge to a state statute.

The only argument that casts the slightest cloud on this Court's jurisdiction appears at pages 3-4 of the motion, where appellee suggests that, because of the expiration of the wine and okolehao exemptions on June 30, 1981, the case is moot. Yet this case is one seeking a refund of taxes paid. A case seeking a money judgment cannot be moot just because of the expiration of the statute that initially gave rise to the dispute. *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369, 372 n. 2 (1974).

Mootness arguments to one side, the appellee has used the vehicle of a motion to dismiss or remand in order to put his arguments on the merits before the Court in advance of the oral argument, now set for January 11. There is no reason why this Court, whose own jurisdiction is secure under 28 U. S. C. § 1257(2), should entertain these arguments on the merits at this stage. All of appellee's arguments can be considered at the hearing of the case on the merits.

2. A second reason for denying the motion is that, as the appellee admits (Motion at 3), the arguments he now asserts were not raised in the Hawaii courts.[1] The statute giving jurisdiction to this Court limits the arguments thay may be made here to those that have been raised and preserved below. *E.g., Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Webb* v. *Webb*, 451 U. S. 493 (1981). Although a party need not assert

[1] The severability claim (Motion at 4) was raised below but not passed on by the state court. The status of the Twenty-first Amendment defense (*id.* at 4-5) is more cloudy. But both severability and the Twenty-first Amendment are so squarely addressed to the merits rather than this Court's jurisdiction that we need not discuss them here.

his arguments using any magic formula, *see Eddings* v. *Oklahoma,* 455 U. S. 104, 113-114 n. 9 (1981), the party must at least assert the outlines and basic support of the argument. The appellee did not even hint in the state courts that, as a matter of state law, the appropriate person to seek a refund of taxes wrongfully collected is other than the person who paid those taxes. (There is no such requirement in state law; see below.) And although a party may defend a judgment on any available ground, that ground must have been properly raised and preserved in the lower courts. *Hankerson* v. *North Carolina,* 432 U. S. 233, 240 n. 6 (1977) ("The State as respondent may make any argument *presented below* that supports the judgment of the lower court") (emphasis added); *United States* v. *New York Telephone Co.,* 434 U. S. 159, 166 n. 8 (1977). *Cf. Massachusetts Mutual Life Ins. Co.* v. *Ludwig,* 427 U. S. 479 (1976).

Appellee attempts to portray his argument that the economic incidence of the tax fell on persons other than wholesalers as one based on Article III of the Constitution, and thus as one that can be asserted at any time. This argument is incorrect, however. If state law, like Hawaii's, allows the payor of taxes to recover them, there is no Article III objection to a suit for refunds even were someone else shown to have borne the economic incidence of the tax. The Article III case or controversy comes from the fact that the party before the court is the one that will benefit from a decision in his favor. If the state's law allows refund suits by the payor of a tax, Article III interposes no bar to review by this Court. And because the appellee raised no state law objection to this suit for refunds, this Court must assume that under state law the appellants are the appropriate persons to recover. *Cf. Konigsberg* v. *State Bar of California,* 353 U. S. 252, 257, 259-261 (1957).

At all events, there could be no serious Article III objection even if it had been *established* in the lower courts—which it was not—that the economic incidence of the tax did not fall on the

taxpayers. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1969), a defendant in an antitrust case attempted to argue that the direct payor of an overcharge had "passed on" the full overcharge to its customers. This Court assumed the truth of that argument and held that, as a matter of law, the direct payor could recover the full amount of the overcharge. It held this in part because any overcharge "takes from the [victim] more than the law allows" (392 U. S. at 489)—which is true here, too—and because in a complex economy it is almost inevitable that the direct payor of an overcharge (or a tax) will bear some of the economic incidence of the payment. *See also Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 731-33, 741-43 (1977) (discussing theory of economic incidence). *See also* McLure, *Incidence Analysis and the Supreme Court: An Examination of Four Cases From the 1980 Term,* 1 Supreme Court Economic Rev. 69 (1982).

3. A third reason for denying summary relief on the merits is that the "passing on" requirement is not an element of plaintiffs' case under Hawaii law. Even if cognizable, this would at best be a defense which, as noted earlier, was not presented below. This case is brought under two explicit refund statutes—one (Haw. Rev. Stat. § 244-8) dealing with refunds of liquor taxes, and the other (Haw. Rev. Stat. § 40-35) dealing with payments under protest.[2] Neither statute makes it a condition of the refund that the taxpayer have borne the burden

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[2] H. R. S. § 244-8(c). If the taxpayer has paid or returned with respect to any month more than the amount determined to be the correct amount of tax for such month, the amount of the tax so returned and any assessment of tax made pursuant to the return may be reduced, and any overpayment of tax may be credited upon the tax imposed by this chapter, or at the election of the taxpayer . . . may be refunded. . . .

H. R. S. § 40-35(a). Any disputed portion of monies representing a claim in favor of the State may be paid under protest . . . . (b) Action to recover money paid under protest . . . may be commenced by the payer or claimant against the [person] to whom the payment was made . . . within thirty days from the date of payment . . . .

of the tax. Nor is there any Hawaii case law placing such a burden of proof on the taxpayer. Since the defense was not presented below, this Court is entitled to assume that it is not applicable to the facts of this case, and cannot consider it as a basis for affirmance. *O'Bannon* v. *Town Court Nursing Center,* 447 U. S. 773, 785 n. 17 (1980).

4. Our final response is that the set of facts portrayed by the appellee—with the wholesaler "stating" the tax separately and passing it on to the retailer—is simply not the set of facts presented by this record. As the record stands, the Court should take it as established that the wholesalers do bear the incidence of the tax. They bear its *legal* incidence, since the parties have stipulated that the wholesalers are liable for its payment whether or not their customers have paid their invoices by the due date, and a "substantial number of [appellant's] customers take more than thirty days to pay their bills." JA 15-16, 22. The appellants likewise bear the economic incidence of the tax, as it has been stipulated that appellants' imported wines and spirits "are rendered more expensive than comparable domestic products" (JA 16, 23)—in the case of European imports, nearly twice as expensive (JA 16-17, 23). Appellants' sales thereby suffer, and to sell at the same volume as before they are forced to take less of a markup to compensate for the discriminatory tax.

Indeed, the State's argument proves too much, since to stay in business every seller has to "pass on" his costs in the sense urged by appellee. The plain fact that a selling price is higher than a seller's costs, including taxes that he pays on the sale of his product, does not demonstrate without more that he has been "compensated for the tax." If that were the extent of the test, no tax refunds could ever be granted because every successful seller would fail to satisfy the test, and Hawaii's consumers could scarcely be expected to satisfy the requirements of Haw. Rev. Stat. § 40-35 every time they purchased a bottle of wine, okolehao or rum. The consequence would be

that all refund suits would fail, and Hawaii could be under no disincentive to adopt discriminatory taxes, or to continue their use.

The assertion that appellants have stated the tax separately on their invoices is also unsupported. Not only is the record devoid of any evidence on this point, but also, had the appellee sought such evidence below, it would have found it overwhelmingly to the contrary. The enforcement remedy afforded by Haw. Rev. Stat. § 281-83 is useless, since it provides for the collection, not of the overdue invoice amount, but only of the portion representing the tax (if separately stated), which is a fraction of the total amount owed. Haw. Rev. Stat. § 244-5, on which the remedy in § 281-83 depends, is *permissive,* not mandatory, and because of the futility of the remedy, the right to state taxes separately simply is not used.

Finally, any "windfall" effect is due entirely to the State, which has since 1979 been on notice that its liquor tax was constitutionally defective, and which has allowed the escrowed taxes to accumulate while doing nothing to change its statute and remove the basis for payments under protest. The State is saying in effect that because it has waited too long and let the taxes mount up, the amount now is too huge to be refunded to the taxpayers, so the State should be allowed to realize the taxes instead.[3]

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[3] Appellants are interested, but not sanguine, to read that the size of their "windfall" will amount to "over 100 million dollars," since they have not paid anywhere near that much in taxes for the years in question. Nevertheless, if anyone stands to realize a windfall in this case it will be the State, which no matter what the outcome will realize the bulk of the taxes escrowed. These are the taxes paid in by appellees McKesson and Paradise, who did not appeal the judgment below.

CONCLUSION

The motion to dismiss or remand should be denied.

Respectfully submitted,

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December 1, 1983

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No. 82-1565

In the Supreme Court

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OCTOBER TERM, 1983

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Appellee.

On Appeal from the Supreme Court of the State of Hawaii

OPENING BRIEF FOR APPELLANTS BACCHUS IMPORTS, LTD. AND EAGLE DISTRIBUTORS, INC.

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QUESTIONS PRESENTED

1. Does a state tax of 20% ad valorem on the sale at wholesale of all liquor sold in Hawaii, which singles out (by exemptions for locally produced liquors) imported liquor for discriminatory taxation, constitute a duty or impost on imports prohibited by the Import-Export Clause (U.S. Const. art. I, § 10, cl. 2)?

2. Does such a discriminatory state tax, imposed for the express purpose of fostering and protecting certain local liquor industries, and of promoting the consumption of their products, infringe unconstitutionally on the power of Congress under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3)?

3. Does such a discriminatory state tax, by exempting from the tax certain locally made liquors while taxing similar liquors imported into Hawaii by appellant wholesalers, deny to them the equal protection of the laws (U.S. Const. amend. XIV, § 1)?*

**List of all parties to the proceedings below.* The parties to the proceedings in the Hawaii Tax Appeal Court and in the Hawaii Supreme Court were Bacchus Imports, Ltd. (plaintiff in Case No. 1852 in the tax appeal court), Eagle Distributors, Inc. (plaintiff in Case No. 1866), Paradise Beverages, Inc. (plaintiff in Case No. 1862), and Foremost-McKesson, Inc., dba McKesson Wine & Spirits Co. (plaintiff in Case No. 1867), and George Freitas, Director of Taxation of the State of Hawaii (defendant in all cases). In the Hawaii Supreme Court all of these cases were consolidated as No. 7802, October Term 1979.

Rule 28.1 statement. Appellants provided the list of parent companies, subsidiaries other than wholly-owned subsidiaries, and affiliates required by Rule 28.1 at page iii of their Jurisdictional Statement filed on March 15, 1983.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Table of Authorities

Cases

Table of Authorities

Cases

Constitution

Table of Authorities

Statutes

Congressional Record

Legislative Reports

Law Reviews

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OPINIONS BELOW

The opinion of the Hawaii Supreme Court in this case is reported at 65 Haw. ____, 656 P.2d 724 (1982), and is reproduced in the Appendix to the Jurisdictional Statement ("AJS") beginning at A-1. The opinion of the Hawaii Tax Appeal Court has not been reported, and is reproduced at AJS A-41.

JURISDICTION

The judgment of the Hawaii Supreme Court (AJS A-56), which sustained the validity of the Hawaii liquor tax (H.R.S. § 244-4, set out at pp. 2-3 *infra*) against a challenge based on the United States Constitution (art. I, § 8, cl. 3; art. I, § 10, cl. 2; and amend. XIV, § 1), was entered

on January 5, 1983. The notice of appeal (AJS A-59) was filed with the Hawaii Supreme Court on March 3, 1983 and the appeal was docketed on March 15, 1983. Probable jurisdiction was noted by this Court on June 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 8, clause 3 of the United States Constitution provides in part: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ."

Section 10, clause 2 of the same article provides in part: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . . ."

Section 1 of the Fourteenth Amendment provides in part: ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Section 244-4 of the Hawaii Revised Statutes, as amended to date, provides:

> Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty percent of the wholesale price of the liquor so sold or used, provided, that the tax shall be paid only once upon the same liquor; provided, further, that the tax shall not apply to:
>
> (1) Liquor held for sale by a permittee but not yet sold;
>
> (2) Liquor sold by one permittee to another permittee;

(3) Liquor which is neither delivered in the State nor to be used in the State, or which under the Constitution and laws of the United States cannot be legally subjected to the tax imposed by this chapter so long as and to the extent to which the State is without power to impose the tax;

(4) Liquor sold for sacramental purposes or the use of liquor for sacramental purposes, or any liquor imported pursuant to section 281-33;

(5) Alcohol sold pursuant to section 281-37 to a person holding a purchase permit or prescription therefor, or any sale or use of alcohol, so purchased, for other than beverage purposes;

(6) Okolehao manufactured in the State for the period May 17, 1971 to June 30, 1981;

(7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981; or

(8) Rum manufactured in the State for the period May 17, 1981 to June 30, 1986.

STATEMENT OF THE CASE

This appeal presents a simple, but fundamental, question for review. May a state employ a tax which on its face discriminates against interstate and foreign commerce in order to foster and protect local industry? The surprising answer of the Hawaii Supreme Court was affirmative.

Appellants Bacchus Imports, Ltd. ("Bacchus") and Eagle Distributors, Inc. ("Eagle") are companies licensed to import alcoholic beverages into Hawaii and to sell them at wholesale to other licensees. Joint Appendix ("JA") 7, 12. Hawaii imposes a tax at a rate of 20% of the wholesale price on the first sale at wholesale of liquor.[1] Because the

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[1] "Liquor" is defined by section 281-1 of the Hawaii Revised Statutes as follows:

"Liquor" or "intoxicating liquor" includes alcohol, brandy, whiskey, rum, gin, okolehao, sake, beer, ale, porter, and wine;

tax is based on the actual wholesale price, it includes a tax on all freight charges, customs duties, and federal taxes, as well as the wholesaler's markup. JA 9-10, 16, 22-23. The tax is payable by the wholesaler whether or not it is collected from the purchaser, and is assessed on monthly gross sales reported to the state. JA 8-9, 15-16.

Over the years Hawaii's legislature has enacted several exemptions from the tax expressly designed to foster various local liquor industries. From 1960 to 1965, when the rate of tax was 16%, okolehao (a brandy distilled from the roots of the ti plant) produced in Hawaii was exempted from the tax.[2] This exemption expired in 1965, was reenacted in 1971,[3] was extended again in 1976,[4] and expired in 1981. The same 1976 enactment granted a five-year exemption to wine made in Hawaii from fruit grown in the State.[5] This exemption was allowed to lapse in 1981. While the present case was pending before the Hawaii Supreme Court, however, the legislature enacted and the governor approved a new exemption for "rum manufactured in the State for the period May 17, 1981 to June 30, 1986."[6]

The express intent of these exemptions is to promote the development and growth of local industry through discriminatory protection from the tax imposed on alcoholic beverages imported from foreign countries or the other 49 states. The stated purpose of the original 1960 exemption

and also includes, in addition to the foregoing, any spirituous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, in whatever form and of whatever consistency and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use or may be used or readily converted for use for beverage purposes.

[2] 1960 Haw. Sess. Laws, c. 26, § 1.

[3] 1971 Haw. Sess. Laws, c. 62, § 1.

[4] 1976 Haw. Sess. Laws, c. 39, § 1 (H.R.S. § 244-4(6)).

[5] 1976 Haw. Sess. Laws, c. 39, § 1 (H.R.S. § 244-4(7)).

[6] 1981 Haw. Sess. Laws, c. 182, § 1 (H.R.S. § 244-4(8)).

for okolehao was "to encourage and promote the establishment of a new industry."[7] The 1976 exemptions were justified by the Senate Ways and Means Committee as follows:[8]

> The purpose of this bill is to extend the exemption of okolehao manufactured in the State from the liquor tax for an additional five years, to June 30, 1981. It is hoped that this five-year extension will aid the local okolehao industry to get on a firm financial foundation.
>
> Your Committee has amended this bill to provide a similar five-year exemption to the local fruit wine industry. Testimony received indicated that there may be an economic potential to the State in this area which, hopefully, this bill can help stimulate.

The Conference Committee Report on the latest exemption, for Hawaii-made rum, shows that the legislative purpose of favoring local industry continues:[9]

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[7]1960 Haw. Sen. Journal, Standing Comm. Rep. No. 87. In its original form, the legislation exempted the sole manufacturer by name. *Ibid.; see* Standing Comm. Report No. 222.

[8]1976 Haw. Sen. Journal, Standing Comm. Rep. No. 406-76.

[9]1981 Haw. Sen. Journal, Conf. Comm. Rep. No. 29. The debate on the Report was as follows:

> Senator Abercrombie moved that Conf. Comm. Rep. No. 29 be adopted and H.B. No. 247, S.D. 2, C.D. 1, having been read throughout, pass Final Reading, seconded by Senator Henderson.
>
> Senator Kawasaki rose to speak against the measure as follows:
>
> "Mr. President, generally, I support giving tax exemption to new industries, particularly regarding the manufacture of Hawaiian Liquor, but I have some doubts about an arbitrary five-year exemption that we are providing this particular industry. I'd like to allow them the exemption as long as they need it but a blanket five years without showing cause for it might not be the wisest thing. For that reason, I'd like to vote against this bill."

> The purpose of this bill is to exempt rum manufactured in the State from the liquor tax for five years. . . . Your Committee is aware of the consolidated cases in the State Tax Appeal court, Civil Nos. 1852, 1862, 1866 and 1867, under the name *Bacchus Imports, Ltd., et al. v. Freitas,* currently pending in the State Supreme Court, regarding the validity of certain liquor tax exemptions, and has had extensive discussions with the Attorney General's Office and the State Tax Department regarding the cases. Your Committee also notes that opinions conflict as to whether or not the national tax structure provides an advantage to rum produced in Puerto Rico and therefore makes no findings on that issue. Your Committee does feel, however, that providing a tax incentive in the form of a liquor tax exemption for a period of years is an appropriate method of encouraging the development of a new industry in the State and is therefore in agreement with the intent of the bill.

The discrimination created by the exemption is significant, reflecting both the rate of the tax and its incidence. An alcoholic beverage bottled at a cost of $10.00 will sell in Hawaii for $32.20 if it has been imported from France, but will sell for just $19.10 if bottled in Hawaii. Nearly half of this difference, or $6.50, is accounted for by the 20% tax. JA 11.

> Senator Henderson remarked:
>
> "Mr. President, we have consistently given five-year exemptions, in the initial periods, to these alcohol industries."
>
> Senator Cayetano added his remarks as follows:
>
> "Mr. President, voting with reservations for the bill, my concern is that with respect to new industries, it seems that we have taken a very selective approach. There's really no rationale for us to give one new industry tax exemption status over another. I suggest that when we come into session next year we consider a more comprehensive approach."

Id., 59th Day, at p. 751.

The rate of the tax can cause a similarly exaggerated price differential between two products originating outside of Hawaii. The size of the price differential, which ordinarily would be attributable solely to the freight charges involved, is exacerbated by the 20% surcharge. Thus the same bottle costing $10.00 to manufacture which sells for $32.20 if imported from France will sell for $23.80 if shipped from California. In this case, $2.20 (or more than 25%) of the differential represents the increase added by the Hawaii tax on the freight, shipping, and related markups attributable to the imported bottle. A substantial share of the revenues derived from the tax thus represents a surcharge on the transportation and importation costs for products imported from sister states and foreign countries. JA 11.

Appellant Bacchus made its May 1979 payment of liquor tax under protest,[10] and cited as grounds therefor that the Hawaii Liquor Tax violated the Import-Export and Commerce Clauses of the United States Constitution. JA 13. In June 1979 it filed suit on the same grounds in the Hawaii Tax Appeal Court, and appellant Eagle followed with its payment under protest in August 1979 and its complaint in September 1979. JA 13; 7. By subsequent stipulation, there was later added by amendment to each complaint a claim that the tax violated the Equal Protection Clauses of both the United States and Hawaii Constitutions. The cases were consolidated and heard on stipulated facts in the Hawaii Tax Appeal Court. The decision of that court, written by the Hawaii Attorney General's office on the ex parte request of the tax appeal court (see AJS at A-41), ruled on plaintiff's Import-Export Clause and Commerce Clause contentions, holding in favor of the tax, but did not deal with the Equal Protection arguments.

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[10]Payment of taxes under protest, and subsequent suit for their refund, are provided for in H.R.S. § 40-35, as amended.

The appeals to the Hawaii Supreme Court were consolidated, and briefed and argued on the facts stipulated in the tax appeal court. Again appellants raised the constitutional issues argued below. In an opinion that rejected each of appellants' contentions with respect to those issues, the Hawaii Supreme Court ruled that the tax was constitutional.

The highest state court based its conclusion on a misreading of this Court's consistent rulings prohibiting discriminatory state taxes. The Hawaii court's answer to appellants' claim of discrimination between Hawaiian and non-Hawaiian products was that the Hawaii tax treated Hawaiians and non-Hawaiians alike. Thus, the court's response to the patent discrimination of the statute was to deny discrimination because every wholesaler was subject to the same tax in the same manner. This analysis overlooked the clear command of more than a century of Commerce Clause jurisprudence. State laws that discriminate against out-of-state *products* are invalid, as are those that discriminate against out-of-state individuals.

SUMMARY OF ARGUMENT

The Hawaii Liquor Tax at issue in this case discriminates on its face against alcoholic beverages imported from sister states and foreign countries. That discrimination renders the tax unconstitutional *per se*.

Protectionist statutes and statutes that discriminate on their face against interstate commerce are invalid *per se* under the Commerce Clause. *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). The record in this case shows that the Hawaii Liquor Tax was designed for the express purpose of fostering local industry at the expense of interstate and foreign commerce. Hawaii's protectionist purpose, and the discriminatory language of the statute itself, make further inquiry into the operation or effect of the tax unnecessary.

The Hawaii tax, by discriminating against alcoholic beverages imported from abroad as well as against those shipped from other states, violates the foreign Commerce Clause. *Cook v. Pennsylvania*, 97 U.S. 566 (1878). The discriminatory tax on imported products is, in addition, a state-imposed duty on imported liquor which violates the Import-Export Clause. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 288 n.7 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). The protectionist discrimination between Hawaiian and non-Hawaiian alcoholic beverages also violates the Equal Protection Clause because it creates a classification which is not sustained by any legitimately rational basis. *Compare Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) *with Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). *Cf. Southern Ry. Corp. v. Greene*, 216 U.S. 400 (1910).

Section 2 of the Twenty-first Amendment does not justify the liquor tax. Neither the history nor the language of the amendment provides any support for a discriminatory tax of the type involved in this case. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). The protectionist purpose of the Hawaii Liquor Tax cannot prevail over the dominant federal interest in free trade.

ARGUMENT

I

THE DISCRIMINATORY HAWAII LIQUOR TAX VIOLATES THE COMMERCE CLAUSE

The Hawaii Liquor Tax is, by design, a protectionist measure. It seeks to foster local industry at the expense of foreign and interstate commerce. On its face it discriminates against products solely because of their out-of-state origin. It thus violates what this Court has held, in *Boston Stock Exchange v. State Tax Commission*, 429 U.S.

318 (1977), to be a "fundamental principle" of Commerce Clause jurisprudence:

> No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business."

429 U.S. at 329 (citation omitted).

A. The Basic Purpose of the Commerce Clause Is to Prevent Isolationist and Protectionist Measures like the Hawaii Liquor Tax

The failure of the Articles of Confederation to prohibit the individual states from advancing their own commercial interests by discriminating against goods from other states was "a compelling reason for the calling of the Constitutional Convention of 1787. . . ." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). Economic warfare among the states convinced the Framers that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

The Commerce Clause was the solution. It grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. As this Court has long recognized, the Commerce Clause does more than enable Congress to enact legislation. It also prohibits a state from erecting barriers against the free flow of interstate and foreign trade even in the absence of congressional action. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). That prohibition is basic to the federal system established by the Constitution:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as

its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . ."

. . . .

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-39 (1949). In consistently striking down laws by which states have attempted to isolate their economies and protect their local businesses from interstate competition, this Court has focused on the incompatibility of such protectionist measures with the basic purpose of the Commerce Clause "to create an area of free trade among the several States"[11] which would remain "free from interference by the States."[12]

B. Protectionist Laws and Laws that Discriminate on Their Face Are Unconstitutional Per Se

Although the Court has recognized that an incidental burden on interstate commerce may be permitted when a state acts to further a legitimate local public interest, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624

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[11] *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

[12] *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

(1978).[13] Despite the Court's description of the rule as one of "virtually" *per se* invalidity, it is clear that economic protectionism "is *impermissible* under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring). The cases demonstrate that a finding of protectionism is fatal to a statute discriminating against interstate commerce.

In addition, *any* statute that discriminates on its face against interstate commerce is, even in the absence of evidence of the state's purpose, so suspect under the Commerce Clause that the burden is cast upon the state to prove its constitutionality. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). As this Court held in *Hughes*:

> [F]acial discrimination [against interstate commerce] by itself may be a fatal defect, regardless of the state's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." At a minimum such facial discrimination involves the strictest scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives.

441 U.S. at 337 (citation omitted).[14] Thus, a discriminatory statute is invalid unless the state shows that there is no

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[13]*See also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) (citation omitted):

> Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."

[14]*See also Minnesota v. Clover Leaf Creamery Corp.*, 449 U.S. 456, 471 n.15 (1981) (discriminatory effect can invoke *per se* rule); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978):

> [w]hatever [the state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

nondiscriminatory method of achieving any legitimate purpose it is alleged to serve.

C. The Hawaii Liquor Tax Is Unconstitutional Per Se

This case presents the Court with an avowedly protectionist statute that discriminates on its face against interstate commerce for no legitimate reason. It is unconstitutional both for its protectionist purpose and for its unjustifiable discrimination.

1. The Per Se Rule Applies Because of Hawaii's Impermissible Protectionist Objective

The protectionist purpose of Hawaii's Liquor Tax is beyond question. According to the Hawaii Legislature, the exemptions from tax for locally produced okolehao, wine, and rum were meant "to encourage and promote the establishment of a new industry," to "aid the local okolehao industry," and to stimulate "economic potential to the state in this area [of local wine production]."[15] The state has never disavowed these protectionist purposes. To the contrary, protectionism is the *only* purpose Hawaii advances to justify the discrimination. The state argues that the tax savings realized by Hawaii okolehao producers "could be channelled into a national promotion campaign and competitive pricing," that jobs would be generated by favoring Hawaii producers, that the "benefit to the industry and ultimately the State of Hawaii" justified the discrimination, and that the tax scheme "would give [the wine industry] a stimulus to become a solid, financially sound industry."[16]

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[15]See Statement of the Case, *supra*. The legislature has consistently expressed a protectionist purpose in enacting the various exemptions.

[16]Record ("R.") 268. With such a clear articulation of protectionism as the sole purpose of the Hawaii Liquor Tax, no hypothetical legislative objectives should be considered. *Minnesota v. Clover Leaf Creamery Corp.*, 449 U.S. at 471 n.15; J. Eule, *Laying the Dormant Commerce Clause To Rest*, 91 Yale L. J. 425, 457 (1982).

Thus, the Hawaii Liquor Tax is, by its nature and purpose, a protectionist assault on the basic free trade purpose of the Commerce Clause. If it were allowed to stand it " 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)). A statute enacted for such plainly protectionist reasons cannot survive Commerce Clause scrutiny.

Boston Stock Exchange provides an example of the Court's application of the *per se* rule to a tax designed to foster local industry. Concerned by the growth of securities exchanges in other states, New York enacted a transfer tax on sales of securities that discriminated on its face against sales in other states.[17] The transfer tax's express purpose was to provide a commercial advantage to the New York Stock Exchange and other in-state exchanges. The legislature, the governor, and the New York Stock Exchange (as the law's primary intended beneficiary), all acknowledged that the state's objective was to promote New York's exchanges at the expense of those in other states. 429 U.S. at 323-28. The statute's protectionist nature thus was unquestioned, and no further showing as to its discriminatory effect was necessary. The Court unanimously held that the statute violated the "fundamental

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In any event, the state has not attempted to justify the tax as furthering any other objectives, and the Hawaii Supreme Court accepted the legislative history as an accurate statement of the tax's purpose. AJS A-12 to A-13.

[17]For nonresidents of New York the tax on in-state securities sales was only one-half of the tax on out-of-state sales. In addition, in-state sales by either nonresidents or residents were subject to a maximum tax of $350, while out-of-state sales were taxed without limitation, based solely on the size of the transaction.

principle" that no state could, through its tax scheme, favor local business over interstate commerce. 429 U.S. at 329.[18]

An earlier New York statute, also enacted for protectionist purposes, was held unconstitutional in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). A provision of the New York Milk Control Act setting minimum prices to be paid by dealers to New York milk producers had previously been upheld by the Court in *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934). In *Seelig*, however, the Court was faced with a challenge to another provision of the Act that discriminated against interstate commerce. The provision challenged in *Seelig*, in order "[t]o keep the system unimpaired by competitors from afar," 294 U.S. at 519, barred the sale of milk from other states if the out-of-state producer was paid less than the New York minimum price. New York acknowledged that its purpose was to protect New York milk producers by eliminating the competitive advantage of other producers. *Id.* at 522, 523, 527. The Court struck the law down, holding that when "the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states . . . [then] by the very terms of the hypothesis" the statute imposes an unconstitutional burden on interstate commerce. *Id.* at 522. *See also Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 n.3, 685-87 (1981) (Brennan, J., concurring) (Court should not reach question of law's practical burden on interstate commerce because state's protectionist purpose requires Court to hold law invalid *per se*).

The Hawaii Liquor Tax, like the laws struck down in *Boston Stock Exchange* and *Seelig*, is protectionist. It, too, is unconstitutional.

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[18] The Court rejected, without going beyond the statute's face, the state's arguments that the statute was (1) nondiscriminatory in its practical effect and (2) a valid "compensatory" tax under *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

2. The Hawaii Liquor Tax Is Invalid Because Its Facial Discrimination Against Interstate Commerce Is Unjustifiable

Even if no protectionist purpose is found, a discriminatory state tax is invalid unless the state comes forward with a legitimate local objective and a showing that it had no less discriminatory means to attain that objective. *Hughes v. Oklahoma*, 441 U.S. at 337.

On numerous occasions the Court has struck down facially discriminatory taxes for which no legitimate purpose or need was shown. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court reviewed a Louisiana tax on natural gas that on its face imposed a greater burden on interstate commerce than on intrastate commerce. The tax's facial discrimination was enough to justify application of the *per se* rule because the state's purported justifications did not satisfy the "strictest scrutiny" the Court gives to discriminatory statutes.

The Court used the same analysis to strike down a Tennessee law substantially identical to the Hawaii Liquor Tax in *I. M. Darnell & Son Co. v. Memphis*, 208 U.S. 113 (1908). The Tennessee tax's discrimination against interstate commerce was clear. It taxed all property in the state other than "the direct product of the soil of this state in the hands of the producer and his immediate vendee, and manufactured articles from the produce of the state in the hands of the manufacturer." 208 U.S. at 115.

The Tennessee tax had many of the characteristics that the Hawaii Supreme Court thought established the constitutional validity of the Hawaii tax. Tennessee imposed a tax on *all* goods and then granted exemptions to in-state products. Tennessee treated all taxpayers equally, whether state residents or not; the tax discriminated only against *goods* from other states. As is the case with the Hawaii Liquor Tax, the "burden" of the Tennessee tax could be said to fall wholly within the state. Finally, Darnell could

have reduced its tax burden simply by dealing exclusively in Tennessee products.[19]

However, Tennessee failed to show any legitimate purpose for the discrimination. The tax's constitutionality was therefore "clearly foreclosed by prior decisions of this court." 208 U.S. at 119. Those decisions had "long since clearly established the want of power in a state to discriminate by taxation in any form against property brought from other states." *Id.* at 120-21. *See also Hughes v. Oklahoma,* 441 U.S. 322 (1979) (state law discriminating on its face against interstate commerce in minnows held invalid *per se*); *Welton v. Missouri,* 91 U.S. 275 (1876) (Missouri tax on peddlers selling goods manufactured outside Missouri held to discriminate against interstate commerce in an unconstitutional manner).[20]

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[19]The Hawaii Supreme Court apparently believed the ability of a taxpayer to avoid the liquor tax by switching to Hawaiian wine was a point in favor of its constitutionality. AJS A-25. But a state tax which is designed to, and does, create incentives to shift economic activity into the state is for that very reason unconstitutional. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 331, 335-36 (1977).

[20]In *Guy v. Baltimore,* 100 U.S. 434, 439, 442 (1880) the Court stated the same rule:

> In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, . . . more onerous public burdens or taxes than it imposes upon the like products of its own territory.
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> . . . .
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> . . . The concession of such a power to the States would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States.

Guy held unconstitutional duties imposed by Baltimore solely on goods "other than the product of the State of Maryland."

The vice of the taxes in the above cases was that they, like the Hawaii Liquor Tax, were crafted to promote local interests. But even a statute that does not directly benefit local business is invalid if it discriminates on its face against interstate commerce. In *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), New Jersey landfill operators were among those challenging New Jersey's ban on the transportation of waste products into the state for disposal. 437 U.S. at 626. The Court assumed that the law conferred no benefit on local business and that the purpose of the statute was, as expressed by the state legislature, to protect the environment and the public health and safety. But the law's discriminatory *means* were just as objectionable as a protectionist purpose. New Jersey failed to show any reason—apart from origin—why it needed to discriminate against waste products from other states. Moreover, an evenhanded law treating all waste equally was a feasible and less discriminatory alternative.

An unjustified discriminatory tax on any product, including alcoholic beverages, *e.g.*, *Walling v. Michigan*, 116 U.S. 446 (1886), is unconstitutional. Hawaii has identified no legitimate objective served by its tax. Accordingly, the tax's facial discrimination requires that it be held invalid.

D. The State's Arguments That the Hawaii Liquor Tax Does Not Discriminate Against Interstate Commerce Are both Irrelevant and Incorrect

Despite the protectionist nature of the liquor tax and its violation of the fundamental Commerce Clause principle prohibiting taxes that discriminate against interstate commerce, the state nonetheless attempts to assert the tax's constitutionality. Hawaii's claim is that the tax does not discriminate. But the nondiscrimination arguments advanced by the attorney general—and adopted seemingly without question by the Hawaii Supreme Court—are without any basis.

Although not clearly elaborated by the state or by the Hawaii court's opinion, the nondiscrimination argument ap-

pears to be based upon two propositions: (1) that appellants did not make a sufficient showing of the liquor tax's practical discriminatory operation; and (2) that, in any event, the liquor tax does not discriminate against interstate commerce because all taxpayers, whether Hawaiian or not, are treated equally. Neither proposition supports the conclusion the state desires.[21]

1. Given Hawaii's Protectionist Purpose and the Liquor Tax's Facial Discrimination, Appellants Were Not Required to Show Discrimination in the Tax's Practical Operation

The Hawaii Supreme Court ignored the rule that a state law with protectionist purposes, or one that is discriminatory on its face, is invalid *per se*. Instead, the court held that "taxpayers have failed to demonstrate that the Hawaii Liquor Tax in its *practical operation* works discrimination against interstate commerce." AJS A-50 (emphasis added). Both the imposition of this burden and the conclusion that it was not sustained were erroneous.

First, when a tax is protectionist, as in this case, there is neither a reason nor a need to consider its practical operation. *Baldwin v. G.A.F. Seelig*, 294 U.S. at 522 (direct or indirect burdens on commerce "are irrelevant when the avowed purpose of the obstruction . . . is to suppress or mitigate the consequences of competition between the

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[21]The state has also claimed that because some Hawaiian liquor (sake and fruit liquors) is taxed, there is no discrimination against interstate commerce. R. 269, 276-78. The Hawaii Supreme Court apparently found this argument to have some force. AJS A-21 n.15.

This argument proves far too much. It would allow a state to justify almost any tax discriminating against interstate commerce merely by subjecting *some* local products to the tax, reducing the Commerce Clause to empty words. Of course, such superficial analysis has not prevailed. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) (Louisiana tax discriminating against interstate commerce only in the context of certain unique, isolated transactions, and apparently only because of an accident of statutory drafting, nonetheless held unconstitutional).

states"). Similarly, evidence of the practical operation of a statute discriminating on its face against interstate commerce is irrelevant. Only where (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental, will the Court look past legislative history and facial discrimination to consider the law's practical effect and relative burden on commerce.[22] *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978); *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Second, the Hawaii tax inexorably discriminates against interstate commerce by its very terms, and no further evidence was necessary. Any burden of showing discrimination was met conclusively by the terms of the statute. *See Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 529-30 (1959).

2. A Tax That Discriminates Against Products in Interstate Commerce Is Unconstitutional Even if In-State and Out-of-State Taxpayers Are Treated Equally

The Hawaii Supreme Court, ignoring the disparate treatment of liquor products according to place of origin, focused on the equal treatment purportedly received by all *taxpayers*:

> Bacchus, Paradise, and Eagle gain nothing over a foreign corporation because of their incorporation under Hawaii law. That McKesson is a Maryland corporation and engaged in business elsewhere plays no part in fixing its liability under HRS § 244-4. The corporation presumably is also free to engage in the wholesaling of

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[22]The best example from this Court's decisions is the "compensating" tax approved in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937). Because both the objective and the "practical operation" of Washington's compensatory use tax was to *equalize* the burden on interstate and intrastate commerce, it was held valid under the Commerce Clause. No similar argument is available to Hawaii.

okolehao and pineapple wine if it has reason to believe this will relieve its tax burden.

The Hawaii court tried to distinguish *Maryland v. Louisiana,* 451 U.S. 725 (1981), *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977), and *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963) as cases in which the burden of the discrimination fell out-of-state. AJS A-25 to A-29.[23]

But this case involves a claim of discrimination against out-of-state *products.* The Commerce Clause protects goods in interstate commerce regardless of the residence of those on whom the burden of the state's discrimination falls. *Philadelphia v. New Jersey,* 437 U.S. at 626-27 ("whatever New Jersey's purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state"); *I.M. Darnell & Son Co. v. Memphis,* 208 U.S. 113 (1908) (Tennessee tax discriminating against products from other states held unconstitutional).

The Hawaii Liquor Tax's unlawful protectionist purpose and discriminatory burden on commerce are not mitigated by the fact that both Hawaiian and non-Hawaiian taxpayers must pay its unconstitutional levy. *Minnesota v. Barber,* 136 U.S. 313, 326 (1890).

II
THE IMPOSITION OF THE HAWAII LIQUOR TAX ON IMPORTS VIOLATES THE FOREIGN COMMERCE CLAUSE AND THE IMPORT-EXPORT CLAUSE

In addition to bringing wine into Hawaii from other states, Bacchus and Eagle import wine from foreign countries. JA 9, 14. The Hawaii Liquor Tax, by taxing the first

[23]The Hawaii Supreme Court was surprised a Hawaii resident would even complain:

> We noted earlier that Paradise, a Hawaii corporation engaged in the wholesaling of okolehao, also claims the tax violates the Commerce Clause. . . .
>
> We find it difficult to give much credence to a claim that the tax creates an undue burden on interstate commerce when the

sale of imports by Bacchus and Eagle while exempting Hawaiian products, violates both the foreign Commerce Clause and the Import-Export Clause.

A. By Discriminating Against Imports the Hawaii Liquor Tax Violates the Foreign Commerce Clause

The Commerce Clause applies not only to interstate commerce but also to "Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. The Court's interpretation of the foreign Commerce Clause has, for the most part, paralleled its analysis of the interstate Commerce Clause, *see* section I.C., *supra*, although the Court has recently stated that the states' power to regulate foreign commerce is even more limited because "the taxation of foreign commerce may necessitate a uniform national rule." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).[24] As a result of the need for national uniformity, the fundamental principle of nondiscrimination recognized in the area of interstate commerce applies with equal if not greater force under the foreign Commerce Clause. *Cook v. Pennsylvania*, 97 U.S. 566 (1878).

Two Pennsylvania taxes were challenged in *Cook*. The first statute imposed a tax of one-half of one percent on the sale price of "all domestic articles and groceries" sold at auction while taxing "foreign drugs, glass, earthenware, hides, marble-work, and dye-woods" sold at auction at the rate of three-quarters of one percent. The second statute amended the first to impose a tax on auctioneers of one-quarter of one percent on all sales of "loans or stocks"

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argument is advanced by one who logically would be a "beneficiary" of the alleged discrimination.

AJS A-38 n.17.

[24] "Although the Constitution . . . grants Congress power to regulate Commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd.*, 441 U.S. at 448.

and "on all other sales as aforesaid, except on groceries, goods, wares, and merchandise of American growth or manufacture." 97 U.S. at 569. The Court held both taxes invalid under the foreign Commerce Clause:

> In *Woodruff v. Parham* (8 Wall. 123) and *Hinson v. Lott* (id. 148) it was held that a tax laid by a law of the State in such manner as to discriminate unfavorably against goods which were the product or manufacture of another State, was a regulation of commerce between the States, forbidden by the Constitution of the United States. . . . The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden.

97 U.S. at 573.[25] *See also Welton v. Missouri*, 91 U.S. 275 (1876) (tax discriminating against goods from foreign countries and other states violates interstate and foreign components of Commerce Clause); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827) (discriminatory tax on imports held invalid under foreign Commerce Clause and Import-Export Clause).

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[25]In reaching this holding the Court rejected several arguments on which Hawaii now relies, over one hundred years later. For example, the state has argued that Hawaii's liquor tax is not on the imported goods but on the privilege of doing business. R. 264. Precisely that argument was rejected in *Cook*. 97 U.S. at 570-73. Another argument made below and accepted by the Hawaii court—that the liquor tax is not discriminatory because it treats all taxpayers alike—was also unsuccessful in *Cook*. 97 U.S. at 573 (focus is on discrimination against *goods*). Finally, Hawaii has contended that, because its liquor tax superficially taxes *all* liquor and exempts only *some* Hawaiian liquor from tax, it does not discriminate in favor of local products. R. 269. But *Cook* invalidated precisely such a scheme.

The Hawaii Liquor Tax, like the tax struck down in *Cook*, discriminates on its face against liquor imported by Bacchus and Eagle by taxing such imports while exempting Hawaiian products. Hawaii thus treats foreign imports differently from its local goods. This discrimination is no more valid than the discrimination against products of sister states.

B. By Taxing Imports on the Basis of Their Origin the Hawaii Liquor Tax Violates the Import-Export Clause

The Constitution provides that "[n]o State shall . . . lay any Imposts or Duties on Imports or Exports." U.S. Const. art. I, § 10, cl. 2. "[T]he Import-Export Clause states an absolute ban" on the states' power to tax. *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 751 (1978). As shown below, the Hawaii Liquor Tax is a duty on imports and therefore violates the clause's absolute ban.

1. Taxes Imposed on Imports Because of Their Foreign Origin Fall Within the Absolute Ban of the Import-Export Clause

In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court was presented with a challenge to a Kentucky statute prohibiting importation of distilled spirits without payment of a tax of ten cents per proof gallon.[26] The tax was thus imposed on imports solely because of their origin. Beam objected to the imposition of this tax on whisky imported from Scotland, contending

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[26] The Kentucky law provided:

> No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

377 U.S. at 342. The Kentucky tax, like the Hawaii Liquor Tax, applied to both interstate and foreign alcoholic beverages.

that it was unconstitutional under the Import-Export Clause as an impost or duty on imports. The Court agreed that the tax was "clearly of a kind prohibited by the Export-Import Clause," 377 U.S. at 343, and ruled it unconstitutional.

Beam broke no new ground in holding unconstitutional a state tax discriminating against imports on the basis of their foreign origin. Indeed, *Cook v. Pennsylvania* reached a similar conclusion. In *Cook*, as already noted, two Pennsylvania tax statutes discriminated against imports, in one instance by taxing domestic articles at a lower rate, and in the other by imposing the tax on all imports while exempting certain domestic articles (but like Hawaii, not all). After rejecting Pennsylvania's argument that the tax was on the privilege of auctioning goods rather than on the imports themselves, the Court held the discriminatory tax void as "laying a duty on imports." 97 U.S. at 573. *See also People v. Maring*, 3 Keyes 374 (N.Y. Ct. App. 1867) (tax discriminating against the sale of "foreign wines and ardent spirits" and other imports held to violate Import-Export Clause).[27]

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[27]In *Welton v. Missouri*, 91 U.S. 275 (1876), the Court struck down a tax imposed on peddlers of goods other than those which were the growth, product, or manufacture of Missouri. Although the tax was invalidated under the Commerce Clause, the Court borrowed heavily from Import-Export Clause jurisprudence, including the seminal case of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). In holding that Missouri had invaded a province of exclusive federal power, the Court emphasized that it was the tax's discrimination on the basis of foreign origin which condemned it, and noted that under either the Commerce or Import-Export Clauses

> [t]he commercial power [of Congress] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.

91 U.S. at 282. As discussed below, *Welton* and *Cook* presaged the Court's analysis in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

2. The Court's Michelin Decision Provides Recent Authority for the Continuing Validity of Beam and Cook and for the Conclusion That the Hawaii Liquor Tax Is Unconstitutional

In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the Court was faced with an Import-Export Clause challenge to a Georgia ad valorem property tax. Michelin imported tires and stored them in a warehouse in Georgia for distribution in six southeastern states. Georgia assessed its nondiscriminatory ad valorem property tax on the value of Michelin's property in the state, including the imported tires. Michelin argued that the imported tires had not lost their character as imports and that, under *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), Georgia's ad valorem property tax was unconstitutional as applied to the imported tires.[33]

The Court declined to decide whether the tires retained their character as imports. Instead, it reexamined what it found to be the three concerns of the Import-Export Clause: (1) that the federal government speak with one voice in regulating foreign commerce, without interference from State tariffs; (2) that federal revenues from import taxes not be diverted to the States; and (3) that there be no disharmony among the states caused by one state's imposing duties on imports destined for another state. These concerns would be frustrated, the Court held, by a discriminatory tax falling "on imports as such because of their place of origin." 423 U.S. at 286. Thus, "[t]he Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. Because Georgia's nondiscriminatory ad valorem property tax did not fall on

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[33]*Low* held that, as long as goods retained their character as imports, "a tax upon them, in any shape, is within the constitutional prohibition." 80 U.S. (13 Wall.) at 34. Accordingly, it invalidated a nondiscriminatory ad valorem property tax imposed by California on all property in the state including imported goods.

imports because of their origin, it did not implicate the Import-Export Clause's concerns and it was, therefore, constitutional. To the extent *Low* held otherwise it was overruled.

Michelin is fully consistent with *Beam* and *Cook*. Both of those cases, unlike *Low*, involved *discriminatory* taxes targeted at imports on the basis of their origin, precisely the sort of tax that *Michelin* reaffirmed is within the prohibition of the Import-Export Clause. 423 U.S. at 288 n.7. Neither case depends on the rejected original package doctrine of *Low*, and the Court itself has noted their continuing validity. *Michelin*, 423 U.S. at 288 n.7 (*Cook*); *California Retail Liquor Dealer Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980) (*Beam*).

3. The Hawaii Liquor Tax Is an Unconstitutional Tax on Imports Under Beam, Cook, and Michelin

The Hawaii Liquor Tax, like the taxes struck down in *Beam* and *Cook*, is imposed on imports on the basis of their foreign origin. Hawaiian wine, brandy, and rum are not taxed; imported wine, brandy, and rum are. As *Michelin* makes clear, such discrimination, whether practiced at the moment of importation, at the time of wholesale, or at the point of retail sale, is by its very nature a duty on imports. 423 U.S. at 288 n.7.[29]

The Hawaii Supreme Court simply glossed over the fact that the liquor tax is imposed on products based on their foreign origin. Instead it upheld the tax because of its conclusion that "the Hawaii Liquor Tax offends none of the policy considerations delineated by the Court in *Michelin* . . ." AJS A-20 to A-21. This statement is demonstrably incorrect.

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[29]*Michelin* thus adopts the reasoning, originally stated in *Welton v. Missouri*, see note 27, *supra*, that the Import-Export Clause applies whenever a state attempts to discriminate against a product because of its foreign character.

The first policy consideration under the Import-Export Clause—that a state tax on imports would undermine the federal government's exclusive regulation of foreign commerce—is "the most important purpose of the Clause's prohibition." *Michelin*, 423 U.S. at 286. A state could use a tax on imports "to create special protective tariffs or particular preferences for certain domestic goods" or to "encourage and discourage . . . importation in a manner inconsistent with federal regulation." *Ibid.* The Hawaii Supreme Court's holding that the liquor tax presented none of these dangers ignores the plain fact that the very purpose of the Hawaii Legislature was to protect and nurture certain domestic industries. By its very nature the tax thus acts in derogation of the federal government's exclusive power to tax imports and regulate foreign commerce.

The Hawaii Liquor Tax also interferes with the federal government's exclusive right to duties on imports, the second policy concern of the Import-Export Clause, by substantially raising the price of imported wine, brandy, and rum relative to competing Hawaiian products. *See* Statement of Case, *supra*.[10] A principal fault of such a state tax is that it can be "selectively imposed and increased so as to substantially impair or prohibit importation," *Michelin*, 423 U.S. at 288, thereby affecting the import duties received by the federal government.

Thus Hawaii's tax is imposed on imports solely because of their foreign origin; it thereby invokes the two most important policy concerns inherent in the constitutional prohibition of state taxes on imports. Under any reason-

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[10] This is not a case, like *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 753 (1978), where such effects can be considered "insubstantial." The *Stevedoring* case involved a mere 1% tax on the gross income of a stevedore's entire business. In contrast, Hawaii imposes a 20% tax on the wholesale price of the product itself, which can substantially raise its price. JA 11.

able reading of the Import-Export Clause the Hawaii tax is unconstitutional.[31]

III

SECTION 2 OF THE TWENTY-FIRST AMENDMENT DOES NOT SAVE THE DISCRIMINATORY TAX

Because this case involves a discriminatory state tax on alcoholic beverages, rather than other articles of commerce, it presents a potential issue as to whether the tax may be justified by section 2 of the Twenty-first Amendment. Section 2—on which the state has placed no reliance and which was not discussed by the courts below—provides no basis for discriminatory state taxes. Section 2 does not authorize protectionist state legislation nor concern any local interest involved in this case. The central purpose of section 2 was to allow states wishing entirely to exclude alcoholic beverages from their borders to do so. That purpose, and the history behind section 2, provide no more justification

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[31]The Hawaii court also rejected appellant's equal protection claims on the ground that the statute did not "establish a classificatory scheme that disfavors any of the taxpayers." AJS A-8. However, within a given class of taxpayers (such as liquor wholesalers), equal protection requires that all who are subject to a given law "shall be treated alike, under like circumstances and [conditions] both in the privileges conferred, and in the liabilities imposed." *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 559 (1902), quoting *Hayes v. Missouri*, 120 U.S. 68, 71 (1887). The taxation of appellants' goods of wine originating outside Hawaii, while exempting for illegitimate purposes the sales of Hawaiian products by taxpayers in competition with appellants, treats taxpayers in the same class differently in respect to the same transaction. *Compare Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) *with Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). *Cf. Southern Ry. Corp. v. Greene*, 216 U.S. 400 (1910) (additional tax imposed on out-of-state corporation unconstitutional). *See State v. Bengsch*, 170 Mo. 81, 109, 113-117, 70 S.W. 710, 718-720 (1902) (gallonage tax imposed on all liquor manufactured or imported for sale in state, which exempted native wines, as well as liquor manufactured in state for export, violated equal protection clause).

for the promotion of a state's local alcoholic beverage industry through discriminatory taxation than does the language of section 2.

A. The Purpose of Section 2 of the Twenty-first Amendment Was to Provide a Constitutional Basis for Dry States to Remain Dry

Section 2 is limited by its terms to a prohibition on the "transportation or importation into any State" of alcoholic beverages in violation of state law. This narrow language reflects the history that led to section 2, and the limited state interests to which it is addressed.

This Court's nineteenth-century Commerce Clause opinions established a clear rule absolutely prohibiting state regulation of goods so long as they remained "in" interstate commerce. *E.g., Leisy v. Hardin,* 135 U.S. 100; (1890); *Bowman v. Chicago & Northwestern Ry. Co.,* 125 U.S. 465, 507-08 (1888). Thus, although the police powers of the states to regulate alcoholic beverages within their borders were firmly established, *e.g., Mugler v. Kansas,* 123 U.S. 623 (1887), *License Cases,* 46 U.S. (5 How.) 504 (1847), those powers did not extend to alcoholic beverages or any other commodities in commerce. *Leisy v. Hardin,* 135 U.S. at 119. The Court's "in commerce" rulings imposed a significant restraint on state power because of the "original package" doctrine. Under that doctrine, importation of goods was not complete until the original package in which the goods were shipped was broken or was sold. *Leisy v. Hardin,* 135 U.S. at 110.

The specific application of the original package doctrine to alcoholic beverages in *Leisy v. Hardin* led Congress to pass the Wilson Act, 27 U.S.C. § 121. The Wilson Act was designed to prevent the immunity of goods in commerce from frustrating state prohibition efforts. *See* 21 Cong. Rec. 4954 (1890) (remarks of Senator Wilson). Obviously, a local ban on alcoholic beverages would be seriously cur-

tailed so long as interstate shippers were free to import and sell them in their original packages.

The Wilson Act addressed its narrow purpose by rendering alcoholic beverages subject to state power "to the same extent and in the same manner as though" they had been produced within the state, "upon arrival" in the state. The Wilson Act removed the absolute immunity from state regulation afforded goods in commerce, but it allowed no discriminatory treatment of alcoholic beverages and offered the states no police powers they did not possess in the regulation of domestic products. *See Scott v. Donald,* 165 U.S. 58, 100 (1897) (Wilson Act did not allow discrimination against products of sister states).

The Wilson Act was soon stripped of its practical value by this Court's interpretation of the point at which goods arrived in a state. In *Rhodes v. Iowa,* 170 U.S. 412 (1898), the Court concluded that alcoholic beverages "arrived" for purposes of the Wilson Act only when they were received by the consignee. 170 U.S. at 423. Despite the Wilson Act, then, the states had no power to prevent out-of-state firms from shipping alcoholic beverages into the state. As before, the immunity of goods in commerce prevented prohibition states from preventing unwanted importation.

Congress again responded, with the passage of the Webb-Kenyon Act, 27 U.S.C. § 122. Webb-Kenyon also addressed the narrow problem of unwanted importation by forbidding the "shipment or transportation . . . of . . . intoxicating liquor of any kind, from one state . . . into any other state . . . or from any foreign country into any state" for receipt, possession, or sale in violation of state law. Webb-Kenyon thus accomplished what Wilson had not. It gave the states power to block unwanted imports at their borders. Like Wilson, Webb-Kenyon did not attempt to confer any other power. It did not address the manner in which the states might regulate alcoholic beverages once their police powers attached. This Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland*

Ry. Co., 242 U.S. 311 (1917), and the Court's divided ruling took on great significance in 1933 when Congress considered the repeal of the Eighteenth Amendment.[32]

The Court made clear in *Clark Distilling* Webb-Kenyon's limited purpose.

> [T]here is no room for doubt that [the Webb-Kenyon Act] was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught.

242 U.S. at 324. No question of discrimination against commerce was involved.

As this Court recognized in *Craig v. Boren*, 429 U.S. 190 (1976), section 2 was intended to constitutionalize the state power allowed by Webb-Kenyon.

> The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the License Cases, the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their

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[32]*Clark Distilling* is also significant in its recognition of state police powers. Although section 2 is sometimes seen as a grant of police powers to the states, it neither was necessary as nor intended to be a grant of police powers. The police power is inherent in state sovereignty, and the police power over alcoholic beverages was acknowledged by this Court long before the Twenty-first Amendment. *E.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887). *Clark Distilling*, which preceded the Twenty-first Amendment by sixteen years, itself sustained an exercise of state police powers over alcoholic beverages. 242 U.S. at 320.

Wilson, Webb-Kenyon and section 2 thus would be redundancies if they were meant to confer police powers. Their history shows that they were intended to allow the states to exercise a power that they did not have before—the power to regulate interstate commerce in a limited way.

borders free from implied restrictions under the Commerce Clause. Late in the century, however, Leisy v. Hardin undercut the theoretical underpinnings of the License Cases. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the state's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. . . . With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes.

429 U.S. at 205-206 (footnotes and citations omitted). That framework gave the states power to treat alcoholic beverages transported from outside the state in the same manner as they treated domestic products. It allowed nothing more.[33]

The constitutionalizing of the state power created by Webb-Kenyon was necessary in the eyes of the proponents of section 2 because of the tenuous balance created by the divided opinion in *Clark Distilling*. President Taft and Attorney General Wickersham had found Webb-Kenyon unconstitutional, and the President based his veto of the act on its asserted unconstitutionality. 76 Cong. Rec. 4170 (remarks of Senator Borah). Thus, faced with the dubious constitutionality of the act, a Court able to overrule the prior ruling in *Clark Distilling,* and Congress' ever-present power of repeal, the proponents of state power set about

[33]Section 2 did not, of course, eliminate the Import-Export Clause prohibition of taxes on imports. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980).

providing constitutional status to Webb-Kenyon. The congressional debates confirm this narrow reach of section 2.

Senator Blaine was the manager of S.J. Res. 211, § 2 of which became section 2 of the Twenty-first Amendment. As such, he reported the views of the Senate Judiciary Committee to the full Senate. Senator Blaine explained the purpose of section 2 as follows:

> In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line. Mr. President, the pending proposal will give the states that guarantee . . . .

76 Cong. Rec. 4141.

Senator Borah, a member of the Senate Judiciary Committee, a participant in the earlier congressional debates on Webb-Kenyon, *see* 49 Cong. Rec. 702 (1912), and a leading opponent of the repeal of Prohibition, explained section 2 in the same way. He responded to an amendment that would have eliminated section 2 by arguing that section 2, "which provides for the protection of the so-called dry states," 76 Cong. Rec. 4170, was needed because the Webb-Kenyon Act did not provide "sufficient protection to the dry states," as it was "still of doubtful constitutionality." *Ibid.* Moreover, he argued, eliminating section 2 would mean "asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Ibid.* "It does not seem to me that we can afford to strip the amendment of all effort to protect the dry States." *Ibid. See also* 76 Cong. Rec. 4219 (remarks of Senator Walsh).

The Court's Commerce Clause doctrine, the frustrations of state power it created, and the congressional efforts to ease those frustrations, all show what the debates on

section 2 confirm. The Wilson Act, the Webb-Kenyon Act, and section 2 allow the states to preclude importation of alcoholic beverages. That authorization was necessary because without it a dry state could not hope to remain dry. The articulated historical need for section 2 must be considered when its meaning is addressed.[34]

Even if the history is ignored, however, section 2 cannot be seen as an unrestricted grant of power to the states. Section 2 is limited to the prevention of unwanted "transportation or importation" into a state. That language cannot be read to justify discriminatory treatment of alcoholic beverages allowed into the state and treated, along with domestic products, as legitimate articles of commerce.

B. This Court's Opinions Establish That State Interests Must Be Subordinated to Federal Law and Policy in Appropriate Circumstances

No opinion of this Court has ever interpreted section 2 in a manner that would justify the discriminatory imposition of state taxes such as that found here. Instead, the Court has interpreted section 2 in a practical way that requires careful consideration of the "issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon*

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[34]This Court has been hesitant to consider the legislative history of section 2 in its opinions, *e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-07 n.10 (1980); *State Bd. of Equalization v. Young's Market*, 299 U.S. 59, 63-64 (1936), although the Court has noted the importation focus of section 2. *E.g.*, *Midcal*, 445 U.S. at 106-08. In *Midcal*, the Court's hesitance to examine the legislative history was attributed to canons of construction and a "reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions." 445 U.S. at 107 n.10. In *Young's Market*, the Court rejected an effort to narrow the literal meaning of section 2 by resort to the history showing its purpose of protecting the dry states. 299 U.S. at 64. Any reliance by Hawaii on section 2 in this case would require ignoring both the language and history of section 2.

Voyage Liquor Corp., 377 U.S. 324, 332 (1964). The consideration of the issues involved in a given case must address the relationship of the asserted state interest to the core importation purpose of section 2, and avoid undue impairment of federal interests. Even when the federal power in question is based on or derived from the Commerce Clause, the constitutional provision most directly related to section 2, federal interests may overcome those asserted by the state. *E.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Moreover, state interests play a far less significant role when the central importation concern is not in issue.

The Court's earliest opinions under section 2 are sometimes said to establish a broad scope for state power under section 2. These cases, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939), *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), and *State Bd. of Equalization v. Young's Market*, 299 U.S. 59 (1936), have not been read so broadly by this Court. Each case addressed the importation powers granted by section 2.

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. at 330. The importation focus of the early cases again was recognized in *Midcal*.

> *Young's Market, supra*, concerned a license for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed

> shipments of liquor from other States, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939).

445 U.S. at 107-08. These cases, the Court stated, were decided "largely on the basis of the States' special power over the 'importation and transportation' of intoxicating liquors." 445 U.S. at 108. They did not recognize any general, preeminent state power over alcoholic beverages.

Nor has the Court interpreted its initial Twenty-First Amendment decisions as subordinating the federal commerce power to the state interests recognized by section 2.

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed" then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

Idlewild, 377 U.S. at 331-32.

The early cases themselves rejected the contention that section 2 eviscerated all federal power over alcoholic beverages:

> Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 'freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.' *Young's Market, supra*, at 64.

Midcal, 445 U.S. at 108. Thus, *Midcal* recognized that even the early, most expansive readings of section 2 do not allow state law to override federal policy simply because state law regulates alcoholic beverages.

The Court's opinions have not adopted any hard and fast rule to identify the scope of the respective federal and state powers. Instead, the Court has required that the Twenty-first Amendment and the Commerce Clause be read and considered together and the issues presented by the competing interests they represent addressed in a practical way.

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Idlewild, 377 U.S. at 331-32. *See also Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). Thus, any suggestion of "absolute" state power over alcoholic beverages has been rejected by the Court.

Consistent with *Idlewild's* directive that Commerce Clause interests be considered along with those presented by section 2, the Court has abandoned the view of the early cases that other provisions of the Constitution are overridden by the Twenty-first Amendment. *Young's Market* stated in dictum that the Equal Protection Clause was irrelevant in the case of alcoholic beverages because a classification allowed by the Twenty-first Amendment could not be forbidden by the Fourteenth. *Mahoney v. Joseph Triner Corp.* followed this dictum in an opinion addressed solely to an equal protection argument. This Court's Fourteenth Amendment opinions in *Craig v. Boren*, 429 U.S. 190, 204-10 (1976) (equal protection) and *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process) rejected these contradictions of *Idlewild's* teaching on the coexistence of these different provisions of the "same Constitution." Both cases held Fourteenth Amendment concerns to prevail over state interests asserted under the Twenty-first Amendment. *See Midcal*, 445 U.S. at 108. They showed both the Court's

rejection of the broad implications of the early cases and any rule of state preeminence.[35]

C. In the Context of the "Issues and Interest at Stake" in this Case, the Twenty-first Amendment Provides No Basis for Upholding Hawaii's Discriminatory Tax

Hawaii has not relied on the Twenty-first Amendment in attempting to justify the tax involved here. The state's failure to do so reflects the absence of any legitimate state interest to assert against the undisputed federal interest in free trade that has led to the rule discussed above establishing a "virtual" *per se* prohibition on discriminatory state taxes. Hawaii can articulate no legitimate state interest because the tax is based solely on the forbidden purpose of fostering local industry at the expense of foreign and interstate commerce. This state purpose carries no weight in the accommodation of the interests presented by this case.

As in *Midcal,* the state court has provided an identification of the state policies alleged to be served by the statute in question. Not only has the highest state court identified and articulated the protectionist goal of the statute, AJS at A-12 to A-13, the state attorney general, R. 268,[36] and the state legislature, in a specific policy statement, also have explained that the statute before the Court is based on a goal that is in no way connected with any of the concerns that led to the enactment of section 2 and one that is

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[35]For the reasons enunciated in *Craig* and *Constantineau,* the Twenty-first Amendment does not foreclose Fourteenth Amendment equal protection review of the discrimination involved here.

[36]In *Midcal,* the Court noted that the intervenor and *amicus* state attorney general failed to identify state interests in the resale price maintenance scheme other than those articulated by the state courts. 445 U.S. at 111 n.12. Here, the attorney general not only identifies no additional interests, he affirmatively asserts the purpose stated by the legislature and articulated by the Hawaii Supreme Court.

prohibited to the states by well-established Commerce Clause jurisprudence. There is no question of restricting the importation of alcoholic beverages, and nothing at all related even to traditional state police power interests in the regulation of alcoholic beverages. Instead, the Hawaii tax is designed only to promote local industry over out-of-state industry, a concern nowhere addressed by the language or history of section 2 or this Court's rulings on state power to regulate alcoholic beverages.

In *Midcal*, the state courts' articulation of the state interests and their assessment of the usefulness of the challenged state law in obtaining concededly appropriate local goals were accepted by the Court. 445 U.S. at 111-114. In this case, the state has also provided an articulation of the local interest. Because that interest is not permissible under section 2 or the Commerce Clause, this case presents no true conflict between federal and state interests, and no need to accommodate competing concerns. All that it requires is recognition of the force of the federal interest in the free flow of commerce among the states.[17]

[17] As did *Midcal*, this case presents a clear and fundamental federal interest. In *Midcal*, the Sherman Act prohibition against price fixing provided a specific measure of the federal interest. Here also the federal interest is specific and clearly defined in this Court's decisions barring discriminatory state taxes. The case thus does not present any issue regarding the weight to be given more general federal policies.

CONCLUSION

Hawaii's discriminatory liquor tax violates basic principles of federalism. The decision of the Hawaii Supreme Court upholding the tax is contrary to these principles as consistently applied by this Court. For this reason, and the other reasons set forth in this brief, the judgment below should be reversed.

Respectfully submitted,

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No. 82-1565

In The
Supreme Court of the United States
October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,

Appellants,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION OF
THE STATE OF HAWAII,

Appellee.

On Appeal from the Supreme Court of the
State of Hawaii

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Appellee cannot accept the general and vague questions posed by the Appellants. The questions here may be reasonably stated as follows:

1. Are the Appellants entitled to any relief in this cause when they have not borne the economic burden of the Hawaii Liquor Tax which by statute is passed on from the Appellant liquor wholesalers to the liquor retailers?

2. If the Appellants are entitled to no relief do they have standing to bring this action?

3. Is this case moot since the exemptions in question have expired?

4. If this Court should find that the limited exemptions in question are invalid, should the remainder of the Hawaii Liquor Law be upheld under the principle of severability or alternatively, should this case be remanded to the Hawaii Supreme Court for resolution of the severability question?

5. If this Court should find that the limited exemptions in question are invalid, should this decision be given only prospective application because Hawaii, in enacting the exemptions, was entitled to rely on the prior decisions of this Court under the Twenty-first Amendment?

6. Has the State of Hawaii imposed their liquor excise tax on Appellants in conflict with the Equal Protection Clause, Import-Export Clause or Commerce Clause

restrictions of the United States Constitution because it has exempted from this tax for a limited period two unique Hawaiian alcoholic beverages, namely, pineapple wine and okolehao, in the absence of any showing by the Appellants that these exemptions have any impact on their importation and sale of certain alcoholic beverages (beer and grape wine) in Hawaii and in the absence of any showing that these limited exemptions have had an impact on the free flow of any alcoholic beverages into Hawaii from either interstate or foreign commerce?

7. If the Hawaii Liquor Tax is held invalid, and this decision is not limited to prospective application, are Appellants entitled to receive a windfall of over $100 million dollars in tax collections, when they have not borne the economic burden of the tax and when they have separately stated and passed on the tax to the liquor retailers, as provided by statute?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

COUNTERSTATEMENT OF THE CASE

The Hawaii Liquor Tax is an excise tax which is imposed on the wholesale sale of liquor sold or used in the State. Hawaii Rev. Stat. 244-4. The tax was originally enacted in 1939 to defray "the costs of police, institutions and some other branches of government [which] have been greatly increased due to liquor."[1] When originally enacted, the Liquor Tax contained no exemptions. The tax is imposed on all wholesale liquor sales within the state except for limited exemptions. Section 244-4(3) exempts liquor "which under the Constitution and laws of the United States cannot be legally subjected to the tax. . . ." Appellants' Br. at 3. However, if the liquor tax cannot constitutionally be collected on any transaction or person, the collection is shifted to the next person that is involved in the sale or use of any liquor. Thus, if Appellants,[2] as wholesalers of liquor in Hawaii, are Constitutionally exempted from the tax, their purchasers (the liquor retailers) would be liable for the tax on their subsequent sale of the liquor products.

Though the Appellants were required to remit the tax to the Appellee (Hawaii Rev. Stat. § 244-6), they were permitted to separately state the tax and collect it from the retail dealers. In turn, the retail dealers were required to remit the tax to the Appellants within twenty days after the end of the month in which the purchase has

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[1]Hawaii H. J. 1939 at 1022-1025.

[2]The Appellants in this appeal are Bacchus Imports, Ltd. and Eagle Distributors, Inc. The appeals of the other two distributors, Foremost-McKesson, Inc. and Paradise Beverages were consolidated for disposition in the court below, but they have not joined in this appeal. Foremost-McKesson, Inc. has filed a "Brief for Appellee in Support of Appellants."

been made. Hawaii Rev. Stat. § 281-83. In the event a retailer fails to do so, his license is subject to suspension; (*id.*) and if Appellants fail to notify the liquor commission of this failure, their licenses also would be subject to suspension. (Hawaii Rev. Stat. §§ 244-5, 244-6, and 281-83 are reproduced as appendix C to this brief.) In conformity with this statutory pattern, the Appellants have added the liquor tax to their normal selling price and have collected the same from their purchasers. (See paragraphs 12-14 of the Stip. of Facts of Bacchus, J. A. at 15-16 and paragraphs 11-13 of the Stip. of Facts of Eagle, J. A. at 8-9.)

Because the Hawaii legislature sought to encourage the development of a limited liquor industry in Hawaii (see Appellants' Brief at 5-6 and Jur. Stmt. App. A at A-12-13), it exempted Okolehao from the liquor tax from May 17, 1971 to June 30, 1981 and fruit wine from May 17, 1976 to June 30, 1981. Okolehao is an alcoholic beverage made from the root of the Ti plant, an indigenous shrub of Hawaii. Jur. Stmt. App. A, fn. 7 at A-34. The only fruit wine manufactured in Hawaii was pineapple wine. *Id.*

These products are not liquor items that enter into the mainstream of the consumption or sales of liquor either in Hawaii or anywhere else. They are items which are not generally available, as are other liquor products. Attached to this brief as Appendix A are schedules prepared by personnel of the Department of Taxation of the State of Hawaii from actual liquor tax returns. These schedules show that sales of okolehao and pineapple wine constituted between .2221% of one percent to .7739 of one percent of the total liquor sales in Hawaii for all the

years 1976 through 1981. Total liquor tax collection amounted to $88 million dollars and the total tax exemptions for okolehao and pineapple wine amounted to approximately $320,000. The figures also indicate that in 1976, the first year of the exemption of fruit wine, none was produced in Hawaii and that okolehao sales declined 217% from 1976 to 1981.

As to these exemptions, the Hawaii Supreme Court stated:

1. "We have good reason to believe neither okolehao nor pineapple wine is produced elsewhere." *Id.* fn. 20 at A-39.

2. "We believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii." *Id.* fn. 21 at A-39.

Appellants do not challenge these conclusions. They have submitted their case on stipulations of fact. There is nothing in these facts to indicate: (1) that the Appellants have in any way been injured by the unique limited exemptions in question; (2) that these exemptions promoted products in Hawaii in competition with any imported products; (3) that the exemptions had any impact on the free flow of commerce; or (4) that the Appellants are entitled to any relief, including the refunds claimed, since by statute they have passed the economic burden of the tax on to the liquor retailers.

Appellants have simply rested their case on the assumptions: (1) that the existence of *any* exemptions for Hawaiian produced liquor, irrespective of the nature, scope, or purpose of the exemptions, constitutes protectionist *per se* legislation which invalidates the entire liquor excise tax; and (2) that they are entitled to refunds of all

the taxes that they have paid within the period of the statute of limitations even though they have not borne the economic burden of the tax.

In regard to the issues in this cause, it is significant that the Appellants are only wholesalers of beer and grape wine in Hawaii (Complaint of Eagle Distributors, Inc., App. B at B-9-10; Complaint of Bacchus Imports, Ltd., App. B at B-1). As to Appellants, then, the question is the effect of the limited exemptions on the importation of beer and wine.

There is thus posed here the substantive question of whether limited exemptions to promote the production of okolehao and pineapple wine, products peculiar to Hawaii which are noncompetitive with other liquor products and of limited commercial value, require the Court to invalidate Hawaii's general liquor excise law.

SUMMARY OF ARGUMENT

The Appellants instituted this action for a refund of liquor taxes paid.[3] They are entitled to no refund because they have not borne the economic burden of the taxes.[4] In addition, they are entitled to no declaratory relief. The

[3]The "Complaint For Refund of Liquor Taxes" of Bacchus Imports, Ltd. and Eagle Distributors, Inc. are reproduced as Appendix B to this brief.

[4]As stated in 84 C.J.S., Taxation, § 632: *"A taxpayer who has been otherwise compensated* for the taxes paid is not entitled to a refund thereof" citing *State ex rel. Old Line Life Ins. Co. v. Olsness,* 63 N.D. 695, 249 N.W. 694 (1933). Cf. *Washington Plaza Associates v. State Bd. of Assessments Appeals,* 620 P. 2d 53 (Colo. App. 1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson,* 286 So. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue,* 50 Ill. App. 3d 161, 365 N. E. 2d 574 (1977); *Consolidated Distilled Products Inc. v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed,* 419 U. S. 809 (1974).

question at issue is moot. J. A. at 9, 22. The Appellants thus do not have standing to bring this action because of the absence of a justiciable case or controversy.[5] If the Appellants had standing and the question posed was not mooted by the expiration of the exemptions, even if the exemptions are invalid, they should not be construed to invalidate the entire liquor law which was enacted in 1939 to compensate the State for governmental costs related to the use and sale of alcoholic beverages.[6] The exemptions should be severed from the remainder of the liquor tax if they are invalid.[7] For, the Hawaii legislature would not have intended to throw the government of the State of Hawaii into a fiscal crisis for the limited benefit it sought to achieve by promoting the development of a unique Hawaii liquor industry. The exemptions are not an integral part of the Hawaii Liquor Tax Law since: (1) the law as a whole has as its purpose the generation of revenue; the exemptions have as their purpose the promoting of a local industry; (2) the exemptions were added as amendments to the law many years after its original enactment; (3) elimination of the exemptions would not alter the law's basic operation. (In fact, the okolehao and fruit wine exemptions have been eliminated). In no event should a decision on the merits be given retroactive application because under prior decisions of this Court, the exemptions would be valid.[8] *California v. Washington*, 358 U. S. 64 (1958).

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[5]*United States v. Jefferson Electric Manufacturing Co.*, 291 U. S. 386 (1934); *Valley Forge v. American United*, 454 U. S. 464 (1982).

[6]See Haw. H. J., April 10, 1939 at 1022-1025.

[7]See *United States v. Jackson*, 390 U. S. 570, 585-591 (1968) and cases cited therein; *Reitz v. Mealey*, 314 U. S. 33 (1941); *Field v. Clark*, 143 U. S. 649, 695-696 (1892).

[8]See, for example, *England v. Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964), quote in footnote 17 *infra*.

Even if the Constitutional issues sought to be raised by Appellants were properly before this court, there is no merit to Appellants' position. Any Equal Protection Clause, Commerce Clause or Import-Export Clause restrictions as pertains to liquor must be considered in light of the Twenty-first Amendment. When these Constitutional provisions are considered together, a State's authority to deal with liquor traffic must be weighted against any federal concern in regard to the free flow of commerce.[9]

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[9]As stated in *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324 at 332 (1964):

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.

(See *Craig v. Boren*, 429 U. S. 190 at 206 (1976), where the substance of the above quote is affirmed.)

And as noted in *Dep't of Revenue v. James Beam Co.*, 377 U. S. 341, 344 (1964):

> As we noted in *Hostetter . . . ante* p. 330: '[t]his Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption in its borders.' (Footnote omitted wherein is cited *State Board v. Young's Market*, 299 U. S. 59 (1936).)

The Court in *Beam* also recognized the continued validity of the Webb-Kenyon and Wilson Acts and *De Bary v. Louisiana*, 277 U. S. 108 (1913). In *De Bary* the Court upheld a license tax which was imposed solely on the business of sale of foreign liquor and wine in original packages. (In *Beam*, the Court simply refused to construe the Twenty-first Amendment to completely repeal the Export-Import Clause as to intoxicants (377 U. S. at 345).)

Where, as here, there is no showing that the free flow of commerce has been affected by the limited exemptions in question, the protectionist *per se* rule relied upon by the Appellants cannot logically override Hawaii's interest in the taxation and regulation of its instate liquor traffic or its interest in promoting a local industry. To hold otherwise would simply read the Twenty-first Amendment out of the Constitution in its relationship to the Commerce, Equal Protection and Import-Export Clauses. Since the Twenty-first Amendment was enacted to prevent the Commerce Clause from restricting the State's power to control liquor distribution, production and sales, Appellants' construction of the Commerce Clause conflicts with the Twenty-first Amendment.

Appellants' reliance on the protectionist *per se* rule is improper even if it is not limited by Twenty-first Amendment considerations. In applying Constitutional provisions which conflict with State's taxing or police powers, the Court has always balanced the federal and state interests in resolution of the conflict.[10] The question of whether the Commerce Clause burden is permissible depends on the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Hughes v. Alexandria Scrap*, 426 U. S. 794, 804 (1976). This Court has recently held that local subsidies to encourage local industry posed no burden on interstate commerce.[11] In substance, the liquor tax exemp-

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[10]*Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27 (1980); *Minnesota v. Cloverleaf Creamery Co.*, 449 U. S. 456, 474 (1981).

[11]*White v. Massachusetts Council of Construction Employees*, — U. S. —, 103 S. Ct. 1042 (1983); *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Pike v. Bruce Church, Inc.*, 397 U. S. 137 (1970).

tions in question do not differ from industry subsidies. The burden here on commerce (if in fact any such burden existed) would be identical if the liquor tax were collected on sales of okolehao and pineapple wine and a minor subsidy in the amount of tax collected were paid the manufacturers.

The exemptions were not designed to impose a discriminatory tax on liquor imported into Hawaii for sale and use. Rather, they were enacted to stimulate the manufacture of a small fraction of the liquor products produced in Hawaii. They were enacted to promote the development of a non-existent local industry (pineapple wine production) or to help save a local industry that was struggling to survive (okolehao production). The legislative history of the exemptions makes no mention of competing imported liquor products. The products exempted were not manufactured elsewhere; nor marketed in competition with such products. Their exemption therefore had no effect on either interstate or foreign commerce. See Jur. Stmt. App. A at A-12-13.[12] *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978) is dispositive of the discrimination issue here. There the Court disposed of the interstate discrimination argument on finding that there was no intrastate commerce to be favored. Here there is no interstate or foreign products which compete with the unique exempt Hawaiian products. As *Exxon* holds, if there is no discrimination against inter-

[12]The entire argument of appellants is based on the premise that all liquor products are the same and are necessarily competitive. However, the Court in anti-trust product market cases has taken a different view. See *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962); *United States v. DuPont & Co.*, 351 U. S. 377, 395 (1956).

state or foreign commerce as a matter of fact, there is none under the Constitution.

For the foregoing reasons, this matter should be dismissed for lack of jurisdiction. Alternatively, it should be summarily disposed of on the merits because the Appellants have not established any discrimination against interstate or foreign commerce. Further, if the exemptions are held to be invalid, they should be severed from the rest of the statute (or remanded for resolution of this issue) and a decision so holding should be given only prospective application.

ARGUMENT

I. Introductory Considerations.

Before considering the merits of the Appellants' constitutional arguments, it is necessary to determine whether they have any standing to raise them. They are not the champions of any Constitutional rights except their own. *Frothingham v. Mellon,* 262 U. S. 447, 487-88 (1923). The question of standing relates to: (1) whether the Appellants have suffered any damages or are otherwise entitled to any relief (which in turn is determinative of whether there is before the Court a justiciable controversy), and (2) whether any decision on the merits should be given only prospective application. The question of whether the Appellants are entitled to any relief is dependent upon (1) whether they have borne the economic burden of the tax; and (2) whether the exemptions in question are severable from the remainder of the Liquor Tax Law. We will first consider these issues before turning to the merits of the Appellants' constitutional arguments.

In disposing of the substantive issues, the Hawaii Supreme Court properly found that the Hawaii Liquor Tax Law did not violate the Commerce Clause standards enunciated in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274 (1977); the Import-Export Clause standards of *Michelin Tire Corp. v. Wages,* 423 U. S. 276 (1976); or the Equal Protection Clause standards of *Minnesota v. Cloverleaf Creamery Company,* 449 U. S. 456 (1981) and comparable cases. The tax in question is not imposed on imports or sales in interstate commerce. It is nondiscriminatory in operation and effect. It is imposed only on intrastate activity and it is reasonably apportioned and related to these activities. The Hawaii Supreme Court properly so concluded. The substantive portion of this brief emphasize different aspects of these constitutional questions in support of the conclusions of the Court below.

II. The Appellants Are Not Entitled To Any Relief Because They Have Not Borne The Economic Burden Of The Tax Which By Statute Is Passed On To The Liquor Retailers.

The Appellants sell beer and grape wine to licensees (liquor retailers) in Hawaii at a price equal to their wholesale price plus the 20% tax imposed by § 244-4 of the Liquor Tax Law, plus the one-half percent tax on the wholesale price imposed by Hawaii Rev. Stat. § 237-13(2) (A). J. A. at 15, 22. The wholesale price includes the landed costs of such liquor products in Hawaii plus the Appellants' normal mark-up. *Id.* at 15, 21. Pursuant to Hawaii Rev. Stat. § 281-83, the Appellants' vendees (liquor retailers) are required to pay the liquor tax in question to Appellants within 20 days after the end of the month in which the purchase has been made. This Section further provides: that (1) "on the failure to make the payment

within such time the liquor commission may in its discretion suspend the license of the purchaser . . . ."; and (2) Appellants are required to report this failure to the Liquor Commission or risk the suspension of their licenses.

There can be no doubt that this tax as a practical matter is required to be passed on to Appellants' purchasers and that Appellants did so. See *United States v. State Tax Comm'n of Mississippi,* 421 U. S. 599 at 609, n. 8 (1975). The Appellants have not borne the economic burden of the tax in question.[13] They have separately stated the tax and collected it from the retail liquor dealers. Since the Appellants' request for relief is the refund of liquor taxes paid (App. B, Complaint for Refund of Liquor Taxes of Bacchus Imports Ltd. at B-8), they have asked for no relief that they are entitled to. They would be unjustly enriched by any refund. The general policy against unjust enrichment through the refund of illegal taxes was stated in the annotation to *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, 78 L. Ed. 859, 877 (1934): "[T]he proper party to recover the tax illegally exacted . . . is the person actually bearing the burden of the tax. . . ."

Thus, *"A taxpayer who has been otherwise compensated* for the taxes paid is not entitled to a refund thereof." 84 C. J. S. Taxation § 632.[14] (Emphasis in original.)

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[13]It is arguable that appellants did not even bear the legal incidence of the tax. The excise tax here is analogous to the liquor mark-up before the Court in *United States v. State Tax Comm'n of Mississippi,* 421 U. S. 599 (1975). The Court there held that the liquor mark-up, which was to be passed on to the purchaser, was legally imposed on the purchaser. *Id.* at 607-08.

[14]The foregoing principles have been followed in other cases. See for example, *State ex rel. Szabo Food Services, Inc. v. Dick-*

(Continued on following page)

It would be an anomoly indeed if the Appellants could obtain $100 million dollars of liquor tax revenues from Hawaii, which have been paid by others, and thereby throw the government of the State of Hawaii into a fiscal crisis.[15]

Assuming Appellants are entitled to have adjudicated the validity of the Hawaii Liquor Tax Law and that this Court found that the exemptions invalidated the entire law, still the Appellants are not entitled to the refund of approximately one hundred million dollars. As the foregoing cases illustrate, this would simply amount to a windfall and unjust enrichment at the expense of others who have, as a matter of economics, paid the tax. (See XI below.)

III. Because The Appellants Have Suffered No Damage As A Result Of The Limited Exemptions In Question, They Have Brought No Justiciable Case Or Controversy Before The Court For Adjudication And This Appeal Should Be Dismissed For Lack Of Jurisdiction.

(Continued from previous page)

inson, 286 S. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue,* 50 Ill. App. 3rd 161, 365 N. E. 2d 574 (1977); *Washington Plaza Assoc. v. State Bd. of Assessment Appeals,* 620 P. 2d 52 (Colo. App. 1980); *Consolidated Distilled Products, Inc. v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed,* 419 U. S. 809 (1974); and *State v. Obexer & Sons, Inc.,* 660 P. 2d 981 (Nev. 1983).

[15]The question of whether Appellants are entitled to a refund was not passed on by the Court below. While this might pose a state question requiring remand, this Court in *Tax Comm'n of Mississippi,* stated at 421 U. S. at 609 n. 7:

> "[T]he duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern Limerick, Inc. v. Scurlock,* 347 U. S. 110, 121.

It therefore determined the legal incidence of the liquor mark-up although the question had not been decided by the Mississippi Courts.

Also, in an action to recover taxes, the burden is on the taxpayer to prove its claim.

Although not raised in the proceedings below, the jurisdictional issue can be raised in this Court and the action shall be dismissed if the Court lacks jurisdiction. *Tyler v. Judges of the Court of Registration*, 179 U. S. 405, 410 (1900); *Clark v. Gray, Inc.*, 306 U. S. 583, 588 (1939).

> Article III of the Constitution limits the 'judicial power' of the United States to resolution of 'cases' and 'controversies'. The Constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' *Liverpool S.S. Co. v. Commissioners of Emmigration*, 113 U. S. 33, 39 (1885). The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights. . . .
>
> As an incident to the elaboration of this bedrock requirement this Court has always required that a litigants have 'standing' to challenge the action sought to be adjudicated in the lawsuit. The term 'standing' subsumes a blend of constitutional requirements and prudential considerations. . . .

Valley Forge, Inc. v. Americans United, Inc., 454, 471 U. S. 464, 757 (1982).

The party invoking the Court's jurisdiction must assert a claim of injury in fact and cannot rely on the potential legal claims of others to establish a case or controversy. *Id.* at 473. As otherwise stated in *Valley Forge*, quoting from *Frothingham v. Mellon*, 262 U. S. 447 at 488,

> "'The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . .'" *Id.* at 477.

See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 37-38 (1976); *Aetna Life Ins.*

Co. v. Haworth, 300 U. S. 227, 240-241 (1937); *North Carolina v. Rice,* 404 U. S. 244, 246 (1971); *Ashwander v. Tennessee Valley Authority,* 297 U. S 288, 347-348 (1936) (Brandeis, J., concurring).

In order to raise the tax discrimination question at issue, the Appellants must show that they are affected unfavorably by the discrimination of which they complain. *Roberts and Schaefer Co. v. Emmerson,* 271 U. S. 50, 54, 55 (1926). *Bode v. Barrett,* 344 U. S. 583 (1953). In *Bode v. Barrett,* the court would not pass on a question of state tax discrimination under the Commerce Clause where ". . . [A]ppellants have failed to carry their burden of showing the tax deprives them of rights which the Commerce Clause protects. Cf. *Southern R. R. Co. v. King,* 217 U. S. 524, 534." 344 U. S. at 585. "Discrimination complained of can be attacked only by those discriminated against. This is a well-settled rule of Constitutional Law." 1 Cooley, Taxation § 367 (4th Ed. 1924). The fact that the issue is of great public importance doesn't save the case from mootness. *De Funis v. Odegaard,* 416 U. S. 312 (1974).

In their Complaints, the Appellants do not allege that the exemptions have injured them or shown that they have borne the economic burden of the tax. Without any showing of injury or damages, they have no standing to challenge the constitutionality of the Liquor Tax, including the exemptions in question. For this reason this appeal should be dismissed for lack of jurisdiction.[16]

[16]The foregoing standing rules of the federal courts are followed by the Hawaii court. See *Territory of Hawaii v. Miguel,* 15 Haw. 402 (1907); *Territory of Hawaii v. Sakanashi,* 36 Haw. 661 (1944); *Cullifson v. Stainback,* 39 Haw. 67 (1951). These Hawaii cases require the plaintiff to show direct injury in regard to an alleged unconstitutional statute before being able to adjudicate its unconstitutionality.

IV. Even If The Appellants Have Standing And The Exemptions In Question Are Invalid, The Remainder Of The Hawaii Liquor Tax Law Should Be Upheld Because The Exemptions Are Severable From The Rest Of The Hawaii Liquor Tax Law.

The principle of severability is discussed at length in 2 *Sutherland Statutory Construction*, § 44 at 335-38 (4th Ed. 1973). The general principle of severability is stated as follows:

> . . . Statutes should be construed to sustain their constitutionality when it is possible to do so. The legislature is presumed not to intend the passage of an invalid act. No legislative action is to be declared unconstitutional except for clear and satisfactory reasons. The courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other repugnant provisions. (Footnotes omitted; citing *El Paso & Northeastern Ry. Co. v. Gutierrez,* 215 U. S. 87 1909).) Id. at § 44.01, 335-36.
>
> . . .
>
> Judicial opinions are replete with avowals that separability is to be decided according to the legislative intent.
>
> The rule . . . applies in the case of a tax statute as well as in the case of any other statute.
>
> Unless it is impossible to avoid it, a general revenue law should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. *Id.* at § 44.03 at 338.

Citing 2 Cooley, *Taxation* § 495 (4th Ed. 1924); *Field v. Clark,* 143 U. S. 649 (1892).

In *Field v. Clark,* the Court noted at 696-97:

> . . . A different rule might be disasterous to the financial operations of the government, and produce

the most confusion in the business of the entire country.

In *United States v. Jackson,* 390 U. S. 570, 585 (1968), quoting from *Champlin Refining Co. v. Corporation Comm'n of Oklahoma,* 286 U. S. 210, 234, the Court further noted:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

In *Reitz v. Mealey,* 314 U. S. 33 (1941), the Court held severable an unconstitutional amendment to New York's driver licensing law providing for suspension of automobile driver's licenses. After referring [illegible] York case authority, the Court stated:

> There is no evidence of intent that if the amendments could not stand the legislation as a whole should fail. . . . Successive and frequent amendments have dealt with detail but have left intact the major features of the legislation.

314 U. S. at 39.

Hawaii applies the same general rules as to severability. In *Territory of Hawaii v. Hoy Chong,* 21 Hawaii 39 (1912) the Hawaii Supreme Court noted:

> Where the legislature has endeavored to accomplish a purpose by two distinct means the failure of one by reason of constitutional objections ought not to defeat the operation of the other. See In re ***Fernandez,*** 12 Haw. 120.
>
> ["] It is only when different clauses of an act are so dependent upon each other that it is evident that the legislature would not have enacted one of them without the other—as when the two things provided are

> necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and independency, the act will stand, though different parts of it are rejected." *Hunnington v. Worthen,* 120 U. S. 97, 102 "If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." *Scott v. Flowers,* 61 Neb. 620, 623.

21 Hawaii 39 at 42-43.

In conformity with this judicial rule, the Hawaii legislature has enacted a general severability statute. Hawaii Rev. Stat. § 1-23. The underlying question as to severability here is whether the Hawaii legislature would have kept intact the liquor tax without the particular exemptions here challenged.

The liquor tax was originally enacted in 1939 as a tax on retail sales of liquor to defray increased costs of government due to liquor traffic. H. Stan. Comm. Rep. No. 305 on H. B. No. 436, enacted as 1939 Hawaii Sess. Laws 222; 1939 Haw. H. J. 1023. In 1949 the liquor tax was re-enacted in substantially its present form as a tax on the wholesale sale of liquor. The purpose of the bill was to increase revenue by increasing the tax rate and by increasing compliance by shifting collection to the wholesale distributors. The tax was re-enacted with the broad imposition language and the first five exemptions of the present statute. 1949 Hawaii Sess. Laws 343. In 1971, the exemption for okolehao was enacted in order to promote development of this Hawaiian liquor. 1971 Hawaii Sess. Laws 62. In 1976, this exemption was extended and the exemption

for fruit wines was added. For the years in question the sales exempted were sales of (1) liquor held for sale by a permittee but not yet sold, (2) liquor sold between permittees, (3) liquor not delivered or used in the state, (4) liquor for sacramental purposes, (5) liquor used for nonbeverage purposes, (6) okolehao manufactured in the State between May 17, 1971 and June 30, 1981, and fruit wine manufactured in the state between May 17, 1976 and June 30, 1981. Appellants' Brief at 2-3.

If exemptions 6 and 7 are indeed unconstitutional, as contended by the Appellants, their invalidity should not be construed to invalidate the whole Liquor Tax Law. The fact that the Hawaii legislature by the exemption contained in (3) saved the general excise tax from any constitutional infirmities would support severability of the exemptions.

Also, the exemptions in question are not an integral nonseverable part of the Liquor Tax Law. They were added as temporary amendments to the law years after its original enactment (see *U. S. v. Jackson*, 391 U. S. at 585-591). Elimination of the exemptions would not alter the statute's basic operation. While a Court may be reluctant to substitute its judgment for that of a legislative body in such a circumstance, it is inconceivable that the Hawaii legislature intended to rest the validity of the entire Hawaii Liquor Tax on the validity of exemptions that have no major significance. (See ***Reitz v. Mealey***, 314 U. S. 33 at 39; ***Boston Stock Exchange***, 429 U. S. at 337, n. 15). Thus, the exemptions in question are severable. If this Court should have any question as to their severability under Hawaii law, this case should be remanded for resolution of this issue. As noted in footnote 15 in ***Boston Stock Exchange v. State Tax Comm'n***, 429 U. S. at 337, "Con-

struction of a savings clause is, of course, a question of state law appropriately decided by the state courts."

However, it is self-evident that the Hawaii legislature did not intend the validity of the liquor tax to turn on the validity of the limited exemptions in question.

V. A Decision In Favor Of The Appellants Should Not Be Applied Retroactively By The Court Because Of The Inequitable Results Of Retroactive Application And Because The Exemptions In Question Are Valid Under Prior Twenty-First Amendment Decisions Of This Court.

It is well established that this Court can apply its decisions prospectively. *Chevron Oil Co. v. Huson,* 404 U. S. 97, 106-107 (1971); *Linkletter v. Walker,* 381 U. S. 618, 629 (1965). As indicated in *Chevron,* in cases dealing with nonretroactivity the Court looks at the following three factors: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the Court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) the inequity imposed by retroactive application, "'for [w]here a decision of this Court could produce substantial and inequitable results if applied retroactively there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'" 404 U. S. at 107.

In applying the first test the Court, in ***England v. Louisiana State Bd. of Medical Examiners,*** 375 U. S. 411 (1964) [see also ***Northern Pipeline Const. Co. v. Marathon Pipeline Co.,*** — U. S. —, 102 S. Ct. 2858, 2880 (1982)]

protected a party from the adverse consequences of relying on a prior decision of the Court.[17]

The Court has on numerous other occasions felt that the inequities, burdens and costs prevented retroactive application of its decision. It has applied its decisions prospectively where an election approving the issuance of revenue bonds was held unconstitutional as denying equal protection to the nonproperty owner taxpayers. The Court noted that significant hardship would be imposed on cities, bondholders, and others connected with the utilities if the decision was given retroactive application and bonds previously issued were declared void. *Cipriano v. City of Houna*, 395 U. S. 701, 706 (1969); *City of Phoenix v. Kolodziejski*, 399 U. S. 204, 213-14 (1970). In addition, the Court has applied its decision prospectively when nonpublic schools had relied on public funding and would experience serious financial consequences if they had to reimburse the public schools. *Lemmon v. Kurtzman*, 411 U. S. 192, 198-200 (1973).

Another example of where the Court has applied its decision prospectively is *Brown v. Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955). In commenting on *Brown*, in *Quo Vadis, Prospective Overruling: A*

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[17]As stated therein "On the record in the instant case, the rule we announced today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that Appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." 375 U. S. at 422, 423.

Question of Judicial Responsibility, 28 Hastings L. J. 533, 545 (1977), the author, Traynor, stated:

> Normally, State action that has been declared unconstitutional would be promptly terminated. Given the massive adjustment necessitated by the decision, however, the United States Supreme Court framed its decisions in terms of . . . 'with all deliberate speed' a phrase that enabled the Court to have the new rule take effect in slow motion.

Again in *Rosada v. Wyman,* 397 U. S. 397 (1970), the Court applied its decision prospectively, and gave New York time in which to change its welfare program to conform to federal requirements. The Court felt there was no discrete and severable provision whose enforcement could be prohibited and any incremental costs to the State to comply with the federal statute which was not being complied with would be massive. *Id.* at 421-22.

In *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation v. Norris,* — U. S. —, 103 S. Ct. 3492 (1983), the Court refused to apply its decision retroactively in which it held that it was unconstitutional for State employers to pay lower monthly retirement benefits to women. The Court applied the ruling prospectively since many other employer-sponsored pension plans were involved, and cost of complying would be excessive, and the cost would fall on the State.[18]

The loss of over $100 million dollars in liquor tax collections would result in an extreme hardship on the government of the State of Hawaii. In recent years, the total annual state tax collections and the total annual State

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[18]The Court has also applied its decisions prospectively to allow Congress to rewrite improper legislation. *Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* — U. S. —, 102 S. Ct. 2858 (1982).

budget has been just over $1 billion dollars. The loss would be borne by the general taxpaying public who have already paid the wholesale liquor taxes passed through by the wholesalers. It would be improper "to impose this magnitude of burden retroactively on the public." *Id.* at 3510. If any decision on the merits in favor of Appellants is applied retroactively, the Appellants would receive a windfall and they would be unjustly enriched at the expense of the general public.

A ruling on the merits in favor of Appellants would affect the liquor tax laws of many states.[19] There can be no doubt that the States in enacting these type of revenue measures pertaining to the liquor industry did so in accordance with this Court's interpretation of the Twenty-first Amendment.[20] Thus, if the progression of the law would require invalidation of any type of discriminatory taxes on the manufacture, sale, and distribution of alcoholic beverages, any such decision should be given only prospective application.

VI. The Presence Of The Limited Exemptions Of Okolehao And Pineapple Wine Does Not Result In The Hawaii Liquor Tax Law Denying The Appellants Equal Protection Of The Law.

[19]The magnitude of the retroactive application of any decision by this Court which would invalidate the Hawaii Liquor Tax because of the limited exemptions in question is demonstrated by the fact that 31 states are listed in the *amicus curiae* brief of Distilled Spirits Counsel of the United States, Inc. as having some discriminatory beverage alcohol tax. DSCUS *Amicus* Brief at 2-5.

[20]As indicated in the portions of this brief dealing with the substantive issues, the Hawaii legislature and other state legislatures were relying on "respectable authorities" in assuming the validity of the limited exemptions under prior Twenty-first Amendment decisions of this Court. See *Miller Brewing Company v. State,* 284 N. W. 2d 353 (1979) and Note, *Economic Localism In State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment,* 72 Harv. L. Rev. 1145 (1959).

The Equal Protection issue was dealt with at some length in the opinion below. Jur. Stmt. App. A at A7-16. The Hawaii Liquor Tax is imposed in the same manner on all taxpayers engaging in any liquor business in Hawaii. The Hawaii legislature, to foster a local industry, could exempt certain liquor products from the excise tax without denying equal protection to anyone.

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232 (1890) the court held that the Equal Protection Clause was not designed to interfere with the power of the state to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity (*Id.* at 238). *Madden v. Kentucky*, 309 U. S. 83 (1940) upheld a discriminatory tax on bank deposits in out-of-state banks on the assumption that the tax would be harder to collect and administer from those banks than from the in-state banks (*Id.* at 528). *Allied Storage of Ohio v. Bowers*, 358 U. S. 522 (1959), upheld the exemption of property of nonresidents in storage even though like property of residents was subject to tax. *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 419-424 (1937) held it was constitutional for a state to discriminate between classes to equalize economic advantages, vis a vis their tax structure. In *Fernandez v. Wiener*, 326 U. S. 340, 360 (1945), the Court held that it was permissible for a state to classify community property interests for tax purposes.

In applying the equal protection standards to state taxing measures, this Court has held many times that it is concerned only with the practical operation and incidence of a tax rather than its definition or the precise form of descriptive words in determining its constitutionality. *Lawrence v. State Tax Comm'n*, 286 U. S. 276 (1932); *Wis-*

consin v. J. C. Penney Co., 311 U. S. 435 (1940); *Nelson v. Sears, Roebuck and Co.*, 312 U. S. 359 (1941); *International Harvester Co. v. Wisconsin*, 322 U. S. 435 (1944). It has further held that the validity of a state tax must be adjudged as applied. *Detroit v. Murray Corp. of America*, 355 U. S. 489 (1958). The legislature is entitled to address a current problem, and need not take into account new and hypothetical inequalities that may come into existence as time passes or conditions change. *Queenside Hill Realty Co. v. Saxl*, 328 U. S. 80 (1946). This Court in *Minnesota v. Cloverleaf Cream Co.*, 449 U. S. 456 (1981) noted in footnote 7 at 463, "In equal protection analysis, this Court will assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.' See *Wienberger v. Wiesenfeld*, 420 U.S. 636-48, n. 16 (1975)." In *Carmichel v. Southern Coal Co.*, 301 U. S. 495 (1937), the Court sustained a tax with varying classifications saying, "A legislature is not bound to tax every member of a class or none." *Id.* at 509.

The foregoing cases and many others clearly demonstrate that the Hawaii legislature could enact the exemptions in question within the limits of equal protection. The basis of classification articulated by the Ha-Hawaii legislature alone justifies the classification here for equal protection purposes (see Jur. Stmt. App. A at A-13).[21] These exemptions did not deny Appellants equal

[21]The fact that the exemptions are for a limited period should be considered in reference to all of the constitutional arguments of the Appellants. In passing on the due process validity of zoning restrictions, Courts have held that the prevention

(Continued on following page)

protection of the laws. Neither did they operate to discriminate against any other liquor products.

VII. The Exemptions Of Pineapple Wine And Okolehao Are Not Invalid Under The Commerce Clause Because They Were Enacted To Promote A Local Industry And In Their Practical Operations They Did Not Discriminate Against Interstate Or Foreign Commerce Or Otherwise Impede The Free Flow Of Commerce.

A state tax will be struck down under the Commerce Clause only if in practical operation and effect it significantly adversely effects or discriminates against interstate or foreign commerce. The general principles are set forth in *Lewis v. BT Investments Managers, Inc.*, 447 U.S. 27 (1980). The Court there noted that the Commerce Clause "limits the power of the States to erect barriers against interstate trade." (*Id.* at 35); but that

> This limitation upon state power, of course, is by no means absolute. In the absence of conflicting federal legislation, the States retained authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected. See, *e.g.*, *Raymond Motor Transportation Co., Inc. v. Rice,* 434 U.S. 429, 440 (1978); *Great A & P Tea Co. v. Contrell,* 424 U.S. 336, 371 (1976). (*Id.* at 36). Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of 'delicate adjustment.' Id., quoting *H. P. Hood and Sons, Inc. v. Dumond*, 336 U.S. at 533 (Black, J., dissenting.

Id. at 35-36.

(Continued from previous page)

of development for a limited time for controlled growth does not deny a developer due process of law where a permanent restriction would do so. *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 15 N. E. 2d 587 (1938); *Golden v. Town of Ramapo,* 303 N. Y. 2d 359, 334 N. Y. S. 2d 138, 285 N. E. 2d 291 (1972), *appeal dismissed* 409 U. S. 1003 (1972).

The foregoing was reaffirmed by this Court in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981) wherein it further discussed the Commerce Clause question:

> When legislating in areas of legitimate local concern . . . States are nevertheless limited by the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). If a state law purporting to promote environmental purposes is in reality 'simply economic protectionism,' we have applied a 'virtually *per se* test of invalidity.' *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). Even if a statute regulates 'even handedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'

449 U.S. 456 at 471 (footnote 15 omitted).

In footnote 15, the court stated in *Cloverleaf*, "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect, see *Philadelphia v. New Jersey*, or of discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. at 352-53." In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court noted that the protection of local growers is a legitimate state interest and is constitutional (*id.* at 143) even though it incidentally affects interstate commerce. *Id.* at 142.

For purposes of further analysis here, the following precepts set forth in *Maryland v. Louisiana,* 451 U.S. 725 (1981) are significant:

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977). This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison,* 340 U.S. 349, 356 (1951).

Id. at 754.

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell,* 311 U.S. 454, 455-56 (1940).

Id. at 756.

The first part of the foregoing quotation sets forth the Commerce Clause standard which no one disputes. The second part deals with the application of that standard in a particular case. In the second part, the Court states that the state tax must be assessed in light of its *actual effect* and further that it is the Court's duty to determine whether the tax in its *practical operation* would work *discrimination against interstate commerce.*

In viewing the effect of the Liquor Tax Law, including the limited exemptions contained therein, this Court

should give deference to the factual findings and conclusions of the Hawaii Supreme Court. See *Container Corp. of America v. Franchise Tax Bd.*, — U.S. —, 103 S. Ct. 2933, 2945-46 (1983). The Hawaii Supreme Court found:

(1) Hawaii's tax on wholesaling activity applies to all liquor wholesalers engaged in business in the State. It touches all local sales and uses of liquor produced in foreign countries, in the mainland States, and in Hawaii, with the exception of okolehao and pineapple wine. There is absolutely no indication that it has been applied selectively to discourage imports in a manner inconsistent with foreign policy. Nor is there a scintilla of evidence that it has the effect of a protective tariff or that it has any effect on the demand for imported liquor.

Jur. Stmt. App. A at A-21 (footnotes omitted).

(2) "Okolehao and pineapple wine are not the only alcoholic beverages produced in Hawaii. Also produced here are fruit liquers and sake, a Japanese-type wine."

Id. at A-37, fn. 15. (Premo beer was also produced in Hawaii for some of the years in question; See Appendix A.)

(3) The legislature's reason for exempting 'Ti root okolehao' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S. L. H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating the local fruit wine industry.' S. L. H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.

Id. at A-3. The Hawaii Supreme Court then looked at the Hawaii tax to determine whether it "falls short of the substantially even-handed treatment demanded by the Commerce Clause . . . *Boston Stock Exchange v. State Tax*

Comm'n, 429 U. S. 318, 332 (1977)." *Id.* at A-21. It concluded that "the taxpayers have failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce." *Id.* at A-30 (footnote omitted).

In support of this conclusion, the Hawaii Supreme Court noted: (1) "We also have good reason to believe that neither okolehao [nor] pineapple wine is produced elsewhere." *Id.* fn. 20 at A-39. (2) "Though the taxpayers submitted no evidence on the amount of okolehao and pineapple wine sold in Hawaii, we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii."[22] *Id.* fn. 21 at A-39.

The Appellants do not challenge any of the foregoing conclusions of the Hawaii Supreme Court. Nevertheless, by reliance on *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), and comparable "protectionist *per se* cases" which were distinguished by the Hawaii Supreme Court in its decision (Jur. Stmt. App. A at 25-30), they contend that the Liquor Tax Law is invalid *per se* as protectionist legislation. However, they concede on

[22]As indicated in Appendix A, these exemptions for the year 1976 amounted to .22 of one percent of liquor sales in Hawaii and 3.7 percent of total sales of Hawaiian manufactured liquor products. In the year 1977 these figures are .24 of one percent and 5.76 percent respectively, and for 1978 .32 of one percent and 8.6 percent respectively. Given the stated legislative purpose and the foregoing figures as of 1976 (the date of enactment of the exemptions in question), it is evident that the exemptions in question constituted a subsidy program to get a local industry on its feet, and that any potential burden on interstate or foreign commerce was incidental in nature.

page 20 of their Brief that this Court will consider the law's practical effect and relative burden on commerce where (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. As heretofore indicated, there is here a legitimate state objective credibly advanced; there is no patented discrimination against interstate commerce; and any impact of the exemptions on interstate or foreign commerce is clearly incidental.[23]

The protectionist *per se* cases relied on by Appellants are simply that and nothing more. In each case the state was trying to enhance thriving and substantial business enterprises at the expense of any foreign competitors.[24]

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[23]We agree with the Appellants' statement on page 21 of their Brief that the Commerce Clause question here relates to discrimination against products. At this juncture, Appellants' case totally fails unless they can establish, which they have failed to do and cannot do, that the okolehao and pineaple wine exemptions discriminate against products (beer and grape wine) which they import into Hawaii.

[24]These cases are readily distinguishable from the present case. See IX. and X. below. If Appellants' argument is correct, any state tax policy that in any way attempts to encourage local business, would of necessity have to fall by the wayside. In some immeasurable way, any such state tax policy could impact interstate and foreign commerce. Yet, even in these strictly protectionist cases it is not the parochialism of the states and their policies that is at issue. It is the impact of the policies on the free flow of commerce and trade that is at issue. Here there simply is no adverse impact on commerce because of the peculiar and limited nature of the exemptions. That being the case, all of the authorities relied upon by the Appellants, irrespective of how Appellants would characterize Hawaii's exemptions in question, entitle Appellants to no relief. This Court has never held that a protectionist policy by the states is *per se* invalid if there is not demonstrated an impact on the free flow of trade and commerce. See *Arkansas Electric Coop. Corp. v. Arkansas Public Comm'n*, — U. S. —, 103 S. Ct. 1905 (1983)

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The foregoing conclusions in regard to the Commerce Clause are supported by recent subsidy cases of the Court and the authority granted the states to control liquor traffic under the Twenty-first Amendment (for Twenty-first Amendment analysis see IX. below). The recent local subsidy cases of this Court, *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Reeves, Inc. v. Stake*, 47 U. S. 429 (1980); *White v. Massachusetts Counsel of Constr. Employers*, — U. S. —, 103 S. Ct. 1042 (1983) uphold the states' right in their propriety capacity to promote local industry.

Alexandria Scrap upheld Maryland's effort to control its environment even though Maryland discriminated against outstate processors of junked automobiles. The substance of Maryland's regulation was to subsidize local scrap industries to rid the environment of junk automobiles. In regard to this effort the Court noted:

> We do not believe the Commerce Clause was intended to require independent justification for such action. Maryland entered the market for the purpose agreed by all to be commendable as well as legitimate, of protecting the State's environment. As a means of furthering this purpose, it elected the payment of state funds—in the form of bounties—to encourage the removal of automobile hulks from Maryland streets and junkyards.

Id. at 809.

Significantly, Justice Stevens, in a concurring opinion in *Alexandria Scrap* noted:

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where the Court noted that formalistic distinctions are no longer controlling in defining the limits of state power under the Commerce Clause. Cf. *Seagram & Sons, Inc. v. Hostetter*, 384 U. S. 35 (1966) where the Court refused to infer discriminatory effects on New York's regulation of liquor prices.

> This case is unique because the commerce which Maryland had 'burdened' is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile's scrap-processing business.

Id. at 815.

> Nor in my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.

Id. at 816.

Alexandria Scrap is consistent with the earlier case of *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* upheld California's efforts to correct the evils attending the in-state production and marketing of raisins.

Reeves upheld the power of South Dakota, consistent with the Commerce Clause, to confine the sale of cement which was produced in a state owned plant solely to its residents on authority of *Alexandria Scrap.* As noted in *Reeves,* there is a Commerce Clause difference between states as market participants and states as market regulators. In *Reeves,* the petitioner advanced the protectionist *per se* argument. This Court rejected that argument in footnote 16 of the Opinion (447 U.S. at 442) and commented on it in the text of the Opinion:

> We find the lable 'protectionism' of little help in this context. The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. . . . Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patent unobjectionable purpose

> of State government—to serve the citizens of the State.

(*Id.* at 442.)

The foregoing 'subsidy cases' (*Alexandria Scrap; White;* and *Reeves*) closely parallel the case at bar. The Hawaii legislature in its proprietary capacity was attempting to subsidize nonexistent (pineapple wine) and financially troubled (okolehao) liquor industries peculiar to Hawaii by enacting the exemptions. Exemption of these products had no real or potential impact on the importation of liquors into Hawaii.

Exxon Corp. v. Governor of Maryland, 437 U. S. 117 (1978) in which this Court found no discrimination against out-of-state goods, clearly controls this case. In *Exxon* this Court disposed of any interstate commerce discrimination argument by reference to the particular facts before it:

> Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers or refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are not local producers or refiners, such claim of disparate treatment in interstate and local commerce would be meritless.
>
> . . . [T]he fact that the burden of divesture requirements falls totally on interstate companies . . . does not lead, either logically or as a practical matter, to a conclusion that the state is discriminating against interstate commerce at the retail level.

437 U. S. 117 at 125.

> . . .
>
> In the absence of a relevant Congressional declaration of policy, or a showing of a specific discrimination against, or burdening of interstate commerce, we

> cannot conclude that the states are without power to regulate in this area.[25]

Id. at 129.

In the case at bar, no interstate or foreign commerce has been affected because Appellants have not imported okolehao and pineapple wine or competing products into Hawaii. Furthermore, the Appellants were free to produce or to buy such products upon the local Hawaii market and wholesale them. If there is no discrimination as a matter of fact, there can be no discrimination as a matter of Constitutional law.

VIII. The Exemptions In Question Are Not Invalid Under The Import-Export Clause Because (1) The Liquor Tax Is Imposed On A Sale After Importation; (2) It Is Expressly Permitted By 27 U.S.C. § 121 As Interpreted In De Bary v. Louisiana, 227 U.S. 108 (1913) And Department of Revenue v. James Beam Co., 377 U.S. 341 (1964); (3) It Conforms To The Standards Of Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); And (4) The Exemptions Do Not Discriminate Against Or Burden Foreign Commerce.

The Commerce Clause analysis in Section VII. of this brief is equally applicable here as to whether the exemptions burden or discriminate against foreign commerce. As there indicated, they do not do so.

The Appellants' Import-Export Clause argument is based solely on the untenable premise that the Hawaii Liquor Tax Law "is imposed on imports on the basis of

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[25]In *United States Brewers Ass'n, Inc. v. Healy,* 532 F. Supp. 1312, 1323 n. 42 (D.C. Conn. 1982), the Court discusses the protectionist *per se* rule relied upon by the Appellants. It there noted that: "Invariably the Court infers discriminatory *purpose* only when there is a prior finding of discriminatory impact." (Emphasis original.)

their foreign origin." Appellants' Brief at 27. Nothing could be further from the truth. This tax is imposed on all liquor sales irrespective of their origin. It includes sales of domestic liquors as well as sales of imported liquors except for the two minor exemptions at issue. As above indicated, when initially enacted in 1939 the law contained no exemptions. The Hawaii Liquor Tax is not like the taxes invalidated in *Beam* and *Cook v. Pennsylvania*, 97 U. S. 566 (1878) which discriminated against imports because of their foreign origin. The tax in *Beam* was an *ad valorem* tax on importation. The tax in *Cook* was on the auction of imported goods. The tax here is the same as the tax upheld in *Consolidated Distilled Products v. Mahin*. The Illinois Supreme Court there held that the Illinois Liquor Tax on the wholesale sale of imported goods was not in violation of the Import-Export Clause because the tax was not "upon the importation of liquor." (See 306 N. E. 2d 465 at 466.)

The Court in *De Bary* held that the Import-Export Clause was inapplicable to intrastate sales of liquor after the importation was completed. In *James Beam Co.*, the Court held that the Wilson Act (27 U. S. C. § 121) and *De Bary* were still good law and that a tax on the business of *selling* foreign liquor was permissible whereas a tax on the *importation* was not. 337 U. S. at n. 7, 345-46.

Nor does the liquor tax conflict with *Michelin*. The exemptions do not interfere with exclusive federal regulation of foreign commerce; they were not enacted to and do not in fact discourage importation of foreign liquor into Hawaii; and there was no impact on federal revenues from Imports or Exports.

IX. Any Constitutional Restriction, (Commerce Clause, Import-Export Clause Or Equal Protection Clause) On A State's Power To Regulate Or Tax Intoxicating Liquors

Must Be Considered In Conjunction With The Authority Granted The States Under The Twenty-First Amendment; And, When So Considered, It Is Clear That The Protectionist Per Se Rule Relied On By The Appellants Is Not Controlling, But That The Interest Of Hawaii In Regulating Or Taxing The Liquor Industry Must Be Balanced Against The Actual Effect Of Such Regulation Or Taxation On Interstate Or Foreign Commerce.

A note entitled *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 Colum. L. Rev. 1578 (1975), sets forth the history of the case law concerning the relationship of the Twenty-first Amendment to other Constitutional restrictions. As there noted, two views have been enunciated by this Court concerning the relationship of the Twenty-first Amendment to that of other constitutional provisions. The first view is that the States have absolute authority over liquor traffic within their borders because the language of Section 2 expressly so provided.[26]

This absolutist view was departed from in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341 (1964). In *Beam* the Court prohibited Kentucky from imposing an import tax on whiskey in conflict with the Import-Export Clause. However, *Beam* was limited:

> We have no doubt that under the Twenty-first Amendment, Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's prelim-

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[26]This view was expressed in *State Board of Equalization v. Youngs Market Co.*, 299 U. S. 59 (1936); *Mahoney v. Joseph Trineir Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U. S. 391 (1939), and *Joseph F. Finch & Co. v. McKittrich*, 305 U. S. 395 (1939).

> inary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad.

337 U.S. at 346. The Twenty-first Amendment is particularly significant in the context of Commerce Clause restrictions on state powers. Section 2 has its roots in the Wilson Act, 27 U.S.C. § 121, and the Webb-Kenyon Act, 27 U.S.C. § 122. These statutes took intoxicating liquors out of the reach of the Commerce Clause by withdrawing the immunity of interstate commerce from the shipments of liquor into and across state lines. *Clark Distilling Co. v. Western Maryland R.R. Co.*, 242 U.S. 311, 322-23 (1917). By incorporating these statutes into the Twenty-first Amendment, Commerce Clause powers were constitutionally restricted as to intoxicating liquors. As noted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964):

> Both the Twenty-first Amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution each must be considered in the light of the other and in the context of the issues and interests at stake in any concrete case.

Id. at 322. Even though under the Commerce Clause a state regulatory statute's facial discrimination against interstate commerce may itself be a fatal defect, *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979), it would be improper to view the issues and interests pertaining to liquor traffic only under the standards of the Commerce Clause just as it would be improper to view the same only in terms of the Twenty-first Amendment.

The Court, after reviewing many of its prior Twenty-first Amendment cases, concluded in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97 (1980):

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. . . . Although States retain substantial discretion to establish . . . liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. at 332.

445 U. S. at 110.

In *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599 (1975) this Court denied the authority of Mississippi to regulate or tax the importation of liquor into federal bases under exclusive federal jurisdiction. In declining to decide whether Mississippi's taxing regulation was valid as to nonexclusive federal bases, the Court necessarily gave effect to additional authority granted the states under the Twenty-first Amendment which would have been denied them under the Commerce Clause. *Accord: Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

It is thus well settled that a state may levy taxes on the importation or sale of liquor from other jurisdictions under the Twenty-first Amendment, free of Commerce Clause and equal protection clauses, so long as there are no competing federal interests founded on other provisions of the U. S. Constitution which outweigh the state's interest. *State Board v. Young's Market Co.; Department of Revenue v. James Beam Co.; Hostetter v. Idlewild Liquor Corp.; California Retail Liquor Dealers Assoc. v. Mid-*

cal Aluminum. Under authority of the Twenty-first Amendment this Court has consistently allowed and upheld (1) discriminatory taxation of liquor produced in other states, and (2) direct burdens on interstate commerce of liquor, against Commerce Clause and equal protection clause attack. *State Board v. Young's Market Co.,* 299 U. S. 59 (1936); *California v. Washington,* 358 U. S. 64 (1958). Under the authority of the Twenty-first Amendment many states have enacted tax laws which discriminate against liquor produced in other states. *Amicus* Brief of DSCUS at 2-4 and DSCUS Appendix of Statutes.

It is not uncommon for a state statutory regulation, which is facially discriminatory against interstate commerce, to be upheld because either Congress consented to the state's action in the area, or another constitutional provision restricts the operation of the Commerce Clause. In *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408, 421-27 (1946), Congress exempted insurance companies from the Sherman Anti-Trust Act and gave the states sole power to regulate the insurance industry. The Court upheld a South Carolina statute which taxed foreign insurance companies at three percent of annual premiums, but did not tax domestic insurance companies. This does not differ in substance from *Clark Distilling Co. v. Western Maryland R. R. Co.,* 242 U. S. 311 (1917) (Webb-Kenyon Act); *Board of Equalization v. Young's Market Co.,* 299 U. S. 59 (1936) (Twenty-first Amendment).

Given the history of this Court's interpretation of the Twenty-first Amendment and the Wilson Act and the Webb-Kenyon Act that preceded it, the Appellants must at least establish that the exemptions in question have a serious impact on interstate or foreign commerce. In

fact, the Twenty-first Amendment decisions of this Court to date would uphold the exemptions in question even though they had a significant impact on interstate or foreign commerce. However, the Court need not reach that issue here since the peculiar Hawaii products at issue have never impacted either interstate or foreign commerce and they were exempt to promote a legitimate state interest. Therefore, this Court's decision in *Exxon Corp.* is dispository of any discriminatory Import-Export Clause, Equal Protection Clause or Commerce Clause issue.

X. There Is No Merit To The Argument Of Appellants And Their Amici That The Protectionist Per Se Rule Controls The Disposition Of This Case.

There are several reasons why the protectionist *per se* Commerce Clause rule here is not controlling.

First, the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry. (See Appellants' Brief at 4-6 and Jur. Stmt. App. A at A-12-13.) In renewing the exemption for okolehao in 1971, the House Standing Committee of the Hawaii Legislature reported:

> Testimonies were received that over the past decade well over a million dollars has been lost attempting to create a significant market for Ti root okolehao, fabled in song and legend as Hawaii's own spirit product. Once before, in fact, the industry similarly requested, and the legislature granted, a five year period of exemption which has since expired. . . .
>
> It is hoped by industry that the tax that is temporarily saved by this relatively new and expanding business may be channeled into national promotion and competitive pricing, the result of which is a linking of okolehao to Hawaii as Tequila is to Mexico. Even with the anticipated expanded sales, it is

> expected that the total annual tax otherwise due on okolehao sales would amount to less than $15,000 per year. Relief is not sought from the general excise tax.
>
> Considering the jobs this industry creates and the prospect presented by proper promotion of its product, your Committee believes that the tax revenue loss is nominal only compared with the benefit, particularly when reviewed in light of the thousands of dollars appropriated annually by the state in matching funds to promote other products grown and manufactured in Hawaii. Thus, the benefit to this industry (and the state) is by parity if not in kind.

1971 H. J. Stand. Comm. Rpt. 246 on H.B. No. 588 at 793-94.

This expresses an intent by the Hawaii legislature to subsidize a new industry peculiar to Hawaii with no intent of erecting a trade barrier or a discriminatory tax system against non-Hawaiian liquor products. By these exemptions, Hawaii entered the local market to help a local industry. Hawaii could have acccomplished the same result by imposing the excise tax without the exemptions and granting nominal subsidies to the local okolehao and pineapple wine industries.

Secondly, the protectionist *per se* cases are readily distinguishable from this case. The objective of the Hawaii legislature in enacting the exemptions in question was not the objective sought by New York in enacting the discriminatory tax struck down in ***Boston Stock Exchange v. State Tax Comm'n***, 429 U.S. 318 (1977). The legislation there was specifically intended to promote the New York Stock Exchange ***at the expense of*** stock exchanges in other states.

The same is true of the statutes before the Court in ***H. P. Hood & Sons, Inc. v. DuMond***, 336 U. S. 525 (1949)

and the cases analyzed therein. In *Hood,* New York again specifically tried to use its police powers to curtail competition in the local market. The Court there noted, by reference to its prior decisions, the

> "broad power in the State to protect its inhabitants . . . . . even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that the state may not promote its own economic advantages by curtailing or burdening of interstate commerce." *Id.* at 531-32.

(The Court was referring generally to *Baldwin v. Seelig,* 294 U.S. 511 (1935).

In the *Boston Stock Exchange* case, the Court concluded:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. . . . We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-37.

In *Maryland v. Louisiana,* 451 U.S. 725 (1981) relied upon by the Appellants, this Court struck down the Louisiana tax scheme there involved because competitive users in other states were burdened with the tax while domestic users were not. (*Id.*) There this Court noted, however, that

> [a] State tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell,* 311 U.S. 454, 455-56 (1940).

Id. at 756.

Even apart from Twenty-first Amendment considerations, the Court has never applied the protectionist *per se* rule in the mechanical way that Appellants assert it should be applied here. The actual effect of the state's regulatory or tax scheme on interstate or foreign commerce must be considered. Since the products in question were exempt for a limited time and are unique to Hawaii and have no impact on interstate or foreign commerce, there is no substance to either Appellants' Commerce Clause or Import-Export Clause arguments. Invalidity of their *per se* protectionist argument can be demonstrated by hypothetical circumstances which is very close to the truth. Assume that there was no production for the period in question of any okolehao or fruit wines in Hawaii. Under these circumstances would the Hawaii Liquor Law be declared unconstitutional because of the exemption of these products? The answer is obviously no.

Thirdly, the protectionist *per se* rule, as relied on by appellants ignores the balancing required under the Twenty-first Amendment. In discussing the Twenty-first Amendment at pages 30-40 of their Brief, the Appellants admit that the states are given authority to control liquor traffic in a manner which would be prohibited by the Commerce Clause alone. At page 36 of their Brief, the Appellants note "the consideration of the issues involved in a given case must address the relationship of the assertive state interest to the core importation purpose of Section 2, and avoid *undue impairment of federal interests.*" (Emphasis added.) And at page 38, "The Court's opinions have not adapted any hard and fast rule to identify the scope of the respective federal and state powers. Instead, the Court has required that the Twenty-first Amendment and the Commerce Clause be read and considered together and *the is-*

sues presented by the competing interests they represent addressed in a practical way." (Emphasis added.) In an effort to circumvent the Twenty-first Amendment limitations on the Commerce Clause restrictions the Appellants simply assert that "Hawaii can articulate no legitimate state interests because the tax is based solely on the forbidden purpose of fostering local industry at the expense of foreign and interstate commerce." (Appellants' Brief at 39.) This statement is wrong as a matter of fact. The exemptions have not been granted "at the expense of foreign and interstate commerce". While the Appellants note that discrimination is in regard to products (Appellants' Brief at 8, 21), they completely ignore the fact that no products in competition with the peculiar Hawaiian products of okolehao and pineapple wine were imported into Hawaii for the years in question.

In the *Amicus Brief* of the Wine Institute it is recognized that the states are free to promote local industry by subsidies (Wine Institute Brief at 10, n. 13). However, the Wine Institute fails to note that the same objective with the same impact on interstate commerce could be accomplished by a tax exemption. The Wine Institute, then, after arguing that the protectionist *per se* rule is controlling, considered the Twenty-first Amendment and stated:

(1) "And, of course, *Idlewild* and *Midcal* both held that a balancing analysis was appropriate in cases where state liquor laws are challenged under the Commerce Clause." (Wine Institute Br. at 16);

(2) The Twenty-first Amendment did not "encompass authority to promote a local liquor industry by discriminating between in-state and out-of-state producers." (*Id.* at 18);

(3) The Webb-Kenyon Act ". . . was not intended to confer and did not confer upon any state the power to make *injurious discriminations against the products of other states* which are recognized as subjects of lawful commerce by the law of the state making such discriminations." (*Id.* at 22; emphasis added.)

(4) "This history of the Twenty-first Amendment reinforces the appropriateness of the balancing approach the court has developed in the *Idlewild/Midcal* line of cases . . . whatever powers the states may have in this area, the Twenty-first Amendment was not added to the Constitution to permit the states to promote local producers of alcoholic beverages at the expense of producers located elsewhere." (*Id.* at 25.)

Thus, the Wine Institute admits that a state statute to be invalid must in fact work a discrimination against out-of-state liquor or out-of-state producers of liquor. Furthermore, there must be a balancing of the state's interest to promote the local industry as against the impact on interstate or foreign commerce. This clearly requires the Appellants to rely on something more than a protectionist *per se* rule and completely undermines their position. The Commerce Clause and Export-Import Clause restrictions are not violated unless there is, in fact, discrimination. This is particularly true when these Clauses are considered in light of the Twenty-first Amendment.

The erroneous nature of the Appellants' argument may be illustrated by a syllogism.

Major Premise: Hawaii has exempted two products from its liquor tax.

Minor Premise: Hawaii cannot do so at the expense of interstate or foreign commerce.

Conclusion: Therefore, the Hawaii Liquor Tax Law unconstitutionally discriminates against interstate or foreign commerce.

Obviously, the Conclusion does not follow from the major and minor premises. There is simply nothing to support the Conclusion that the exemptions have the effect of burdening or discriminating against interstate or foreign commerce. In the last analysis, the Appellants' arguments are based on unsupportable factual and legal assumptions.

XI. Even If The Hawaii Liquor Tax Is Held Invalid This Decision Is Not Limited To Prospective Application, Appellants Have No Right To Receive A Refund Because They Have Not Borne The Economic Burden Of The Tax And Therefore Refunds Would Unjustly Enrich Them.

We wish to emphasize here that, even if the Appellants have standing to adjudicate the validity of the exemptions in question or of the Hawaii Liquor Tax Law, still they are not entitled to receive refunds over $100 million dollars in liquor taxes paid. As indicated in I and II above, the Appellants are entitled to no relief because they have not borne the economic burden of the Hawaii Liquor Tax. Appellants have added on the amount of liquor tax to the normal wholesale selling prices of their liquors (J.A., at 9, 15 and 22). Pursuant to Hawaii Rev. Stat. § 244-5 (see Appendix C), Appellants have stated the amount of the liquor tax as a separate part of the wholesale selling price charged to liquor retailers. By separately stating the amount of liquor tax, the liquor retailer becomes responsible for promptly remitting to the Appellant wholesalers the entire amount of the liquor tax or face severe penalties, including suspension of his retail liquor license. Hawaii Rev. Stat. § 281-83. (See Appendix

C.) It cannot be clearer from the facts and from Hawaii's liquor tax structure that Appellants have passed on the entire amount of the liquor tax and have not borne any part of the economic burden of the tax.

When a taxpayer claiming a refund has not borne the economic burden of the tax, the general rule is that the taxpayer is not entitled to a refund on the grounds of unjust enrichment.[27] The principal exception to this rule appears where the taxpayer refunds or is under contract to refund the tax to the purchasers or consumers who ultimately paid the tax, in which case there is no unjust enrichment. 119 ALR 542 (1939) *anno*: "Right as between dealer and taxing authorities in respect of taxes illegally collected." In this case, where Appellants have not refunded the tax and have no contract or agreement to refund the tax to the consumers, Appellants have no right to receive a windfall of over 100 million in tax collections paid by other persons.

In *State v. Obexer & Son, Inc.*, 660 P. 2d 981 (Nev. 1983), the Court had before it the question of whether Obexer (the taxpayer) was entitled to refund of taxes which it paid the State but collected from its customers. In denying Obexer a refund, the Court noted:

> Actions to recover taxes paid are equitable in nature and the burden of proof is on the taxpayer to show that the taxing body holds money that in equity and good conscience it has no right to retain.
>
> . . .
>
> If the taxpayer making the claim has collected the tax from his customers, he has suffered no loss or injury, and is not entitled to a credit or refund even if the tax was paid erroneously.

660 P. 2d at 984. (Footnotes omitted.)

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[27]See II above at 10-12 and cases cited therein.

> Thus, Obexer was merely a conduit for the revenue, and would be unjustly enriched if the State were forced to return to it all of the taxes that it collected from its Nevada customers.

Id. at 985.

In *Consolidated Distilled Products v. Mahin*, 306 N.E. 2d 465 (Ill. 1974), the Illinois Supreme Court held that regardless of whether the Illinois liquor tax imposed on importing distributors was invalid because of discrimination between native wine and wine produced elsewhere, the importing distributors were not entitled to a refund on the grounds of unjust enrichment.

> "The general policy against unjust enrichment . . ., leads us to the conclusion that the plaintiff distributors do not have a right to a refund. That the plaintiffs remitted the tax is not alone determinative. There has been no showing that they bore the burden of the tax. The only proof that bears upon that question is the stipulation that has been quoted, and that shows, or tends to show, that they passed the tax on to the retailers to whom they sold. Certainly it does not show that the plaintiff distributors bore the tax. The fact that the tax was not separately stated in the transaction between the plaintiffs and the retailers to whom they sold is not determinative." at 469-470.

It should be noted that in *Consolidated Distilled Products*, the court held that intervenor liquor consumers also were not entitled to refund of the tax collected. "[W]e agree with the trial judge that there was no adequate showing that the burden of the tax was transmitted through the retailers, with whom alone a distributor may deal, to the ultimate consumers. The intervenors have not shown that they bore the burden of the tax."

In this case, there are no intervenor liquor consumers, no showing has been made that the liquor consumers bore the burden of the tax, and the issue of refund to the liquor consumers has not been raised.

For these reasons, the Appellants are barred from receiving a windfall refund of over $100 million on the grounds of unjust enrichment, regardless of whether the tax is invalid. In practical effect, a decision of this Court holding the tax invalid can only have prospective application.

CONCLUSION

For the reasons set forth herein, this Cause should be dismissed for lack of jurisdiction; or the decision of the Hawaii Supreme Court should be affirmed. Alternatively, if this Court should consider the merits and decide that the exemptions (which have expired) can no longer be justified, it should give the decision only prospective application and hold that the exemptions are severable from the remainder of the Hawaiian Liquor Tax Law or remand this issue to the Hawaii Supreme Court for resolution.

Respectfully submitted,

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APPENDIX A

COMPUTATION OF PERCENTAGE OF OKOLEHAO AND FRUIT WINE SALE TO TOTAL SALES

	1976	1977	1978	1979	1980	1981
Okolehao Sales	170,292.45	206,231.44	235,204.71	149,588.84	73,007.39	36,969.74
Fruit Wine sales	-0-	1,166.00	60,140.26	138,868.93	187,143.81	343,656.93
TOTAL	170,292.45	207,397.44	295,344.97	288,457.77	260,151.20	380,626.67
Total Liquor Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Liquor Sales— Total Exemptions / Total Liquor Sales =	.2221%	.2405%	.3157%	.3246%	.6094%	.7739%
Loss Revenue Due to Exemption Liquor Tax at 20%	34,058.49	41,479.49	59,068.99	57,691.55	52,030.24	76,125.33
Liquor Sales— Total Exemptions / Total Sales of Hawaiian Manufactured Liquors =	3.7%	5.76%	8.6%	20.3%	45.6%	52.2%

TOTAL VOLUME OF ALL LIQUOR SALES AND TAXES

	1976	1977	1978	1979	1980	1981
Tax Base Wholesale Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Amounts of Tax Wholesale	15,331,803.	17,245,821.	18,712,041.	17,771,705.	8,538,135.	9,836,342.
Penalties & Interest	5,779.	21,837.	14,069.	27,186.	26,583.	35,031.
Permit Fees	117.	116.	122.	120.	135.	162.
Total Collections	15,337,699.	17,267,774.	18,726,232.	17,799,011.	8,564,853.	9,871,535.

SCHEDULE OF SALES FOR LIQUOR MANUFACTURED IN HAWAII

	1976	1977	1978	1979	1980	1981
Total Sales	4,518,087.26	3,596,394.34	3,450,597.99	1,420,481.52	558,768.91	728,684.02
Liquor Tax At 20%	903,617.45	719,278.87	690,119.60	284,096.30	111,753.78	145,736.80
Tax Base Wholesale Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Amounts of Tax Wholesale	15,331,803.	17,245,821.	18,712,041.	17,771,705.	8,538,135.	9,836,342.
Penalties & Interest	5,779.	21,837.	14,069.	27,186.	26,583.	35,031.
Permit Fees	117.	116.	122.	120.	135.	162.
Total Collections	15,337,699.	17,267,774.	18,726,232.	17,799,011.	8,564,853.	9,871,535.

APPENDIX B

(Caption Omitted)

COMPLAINT FOR REFUND OF LIQUOR TAXES

[Bacchus Imports, Ltd.]

(Filed June 29, 1979)

I. PARTIES

1.01 Bacchus Imports, Ltd. is a corporation organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii. It is licensed by the State of Hawaii as a wholesaler of beer and wine pursuant to § 281-31 of the Hawaii Revised Statutes (1968), as amended, and as a permittee pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-841, and a Wholesaler's License No. HI-P-2946, issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

1.02 Defendant GEORGE FREITAS is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

II. JURISDICTION

2.01 Beginning on or about January 30, 1978, plaintiff has filed with defendant each month as the same were due liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid

the amount of tax shown on such return, in the total amount of $75,060.22.

2.02 On May 30, 1978 plaintiff sent to defendant, together with its liquor tax return and payment for the month of April 30, 1979, a letter protesting that payment and all previous payments of such tax, a true copy of which is attached hereto as Exhibit A and incorporated herein by reference.

2.03 This action has been commenced within thirty days from the date of such payment and protest, and with respect to such is brought pursuant to Section 40-35 of the Hawaii Revised Statutes, under which Section this court has jurisdiction of this action.

2.04 Jurisdiction of this court as a Circuit Court of the First Circuit is also invoked pursuant to H. R. S. § 603-21.5 for the claim for refund of all payments of tax prior to May 30, 1970 as stated below.

III. COUNT I—CLAIM UNDER ARTICLE I, SECTION 10, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

3.01 Plaintiff imports wine and beer into the State of Hawaii, warehouses such wine and beer on premises licensed by agencies of both the United States and the State of Hawaii, and sells such wine and beer at wholesale.

3.02 Wine and beer imported into Hawaii by plaintiff comes into the State via three different routes:

(1) Wine and beer originating in foreign countries whose first port of entry under the United States Customs laws is Honolulu, Hawaii;

(2) Wine and beer originating in foreign countries whose first port or place of entry under the United States Customs laws is a port or place other than Honolulu, Hawaii; and

(3) Wine and beer originating in one of the forty-nine other States of the United States.

3.03 All of such wine and beer is imported in the cartons or cases in which it was originally packed and shipped, and when sold by the case is sold by plaintiff in such original cartons or cases. Beer is sold only by the case; wine is occasionally sold by the bottle or withdrawn as a sample, and is pulled for such occasion from the case in which it was shipped or from the shelves in plaintiff's warehouses reserved for storage of less than full cases.

3.04 Wine and beer whose first customs port of entry is Honolulu is purchased by plaintiff from its foreign producer or shipper, or from the agent of such foreign producer or shipper, and is received in Honolulu at Pier 39, Foreign Trade Zone No. 9, which is a duly authorized foreign trade zone pursuant to Title 19, Chapter 1A of the United States Code. It is unloaded and stored in bond in either plaintiff's own leased area within such Zone or in the general public storage area operated by the Zone itself. Customs duties on such wine and beer are not paid until the wine or beer is subsequently withdrawn from such bonded storage.

3.05 Wine and beer first brought into the United States at a place other than Honolulu is imported (and duty on it is paid) by an importer other than plaintiff. Plaintiff subsequently purchases such wine or beer from such primary importer and has it shipped to Honolulu,

where it is stored in plaintiff's non-bonded storage facilities until sold or otherwise used.

3.06 Wine and beer originating in one of the other states of the United States is purchased by plaintiff from its producer or from the agent of its producer and is shipped and stored in the same manner described in paragraph 3.05 above.

3.07 Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage mark-up to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:

(1) Inland freight to the port of shipment to Honolulu;

(2) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);

(3) Wharfage fees at Honolulu;

(4) Drayage charges for transportation to plaintiff's warehouse;

(5) Customs brokerage fees;

(6) Customs duties; and

(7) Warehouse handling charges.

3.08 Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

3.09 Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

3.10 The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; various flavored fruit liquers; and a fruit wine made from pineapple. At present, all of Hawaii's commercially available whisky, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

3.11 The Hawaii liquor tax is an unconstitutional State tax upon imports in that it discriminates against imported liquors in accordance with their place of origin since it specifically exempts Hawaii's only domestically produced liquors (except for liquers).

3.12 Furthermore, it interferes with the operation of the federal customs laws by adding to the federal customs duties on imported wines and spirits a surcharge of 20%, thereby taxing revenue of the federal government and rendering such wines and spirits (particularly champagne, whose duty rate is approximately ten times that of still wine) more expensive and ultimately less desirable for the consumer, resulting in a decreased volume of im-

port purchases and decreased customs revenues to the federal government.

3.13 The Hawaii Liquor Tax further discriminates against imports in accordance with their place of origin by placing the heaviest tax burden on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii, so that for example, wines from France (halfway around the world from Hawaii) are taxed significantly more than their equivalents produced in and imported from California. The result again is to make wines of comparable quality and cost of production unequal in the eyes of the consumer, such that an imported wine or liquor will always cost more than its domestic equivalent.

3.14 The effect of the tax in this regard can be illustrated simply by showing the net result on the price to the consumer of an increase of $1.00 in the cost (F. O. B. the winery) of a bottle of French, Californian, and Hawaiian wine, respectively. In a typical case, for every dollar of increase in the cost of a French wine, the Hawaii consumer will end up paying $3.23 more; in the case of a California wine, he will pay $2.38 more, while in the case of an Hawaiian wine, he will pay only $1.91 more. These represent increases of 223%, 138% and 91%, respectively, with the most burdensome increase being borne by the foreign import, and the next most burdensome increase being borne by the domestic import.

3.15 By thus discriminating against imports as such, the Hawaii Liquor Tax is a State-imposed duty on im-

ports in violation of Article I, Section 10, Clause 2 of the United States Constitution.

COUNT II—A CLAIM UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION

4.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.14 above are herewith realleged and incorporated in this Count II by reference.

4.02 The Hawaii Liquor Tax discriminates in the manner above-detailed against both imports of liquor from foreign countries and imports of liquor from the other forty-nine states, and in so doing places an undue burden upon foreign and upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution.

COUNT III—A CLAIM UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION

5.01 Paragraphs 1.01 and 1.02, 2.01 through 2.4, and 3.01 through 3.14 above are herewith realleged and incorporated into this Count III by reference.

5.02 Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale wine and malt beverages.

5.03 The imposition by the State of Hawaii of a tax upon the first sale by plaintiff of wine and malt beverages

imported by it into Hawaii is in derogation of plaintiff's federally licensed right to import, which, as the object of importation is sale, necessarily includes the right to make a first sale free from let or hindrance by any State.

5.04 The Hawaii Liquor Tax, as imposed on a first sale at wholesale of liquor imported by plaintiff into Hawaii, is accordingly an attempt to exercise a revenue-raising power in an area reserved to Congress under the United States Constitution, and as such is invalid under Article VI of said Constitution and under decisions of the United States Supreme Court consistently applied for over one hundred and fifty years since the case of ***Brown v. Maryland,*** 12 Wheat. 419, in 1827.

WHEREFORE, plaintiff prays that judgment issue against defendant directing him to refund all liquor taxes paid by plaintiff from January 1978 to the date of judgment, together with interest thereon as allowed by law, and for such other and further relief as may be fitting and just.

DATED: Honolulu, Hawaii, June 29, 1979.

/s/ Allan S. Haley
Attorney for Plaintiff

BACCHUS IMPORTS, LTD.

May 30, 1979

Director of Taxation
State of Hawaii
225 Queen St.
Honolulu, Hawaii 96813

Gentlemen:

Bacchus Imports, Ltd. herewith gives notice pursuant to H. R. S. (Section 40-35) (1968), that it intends to appeal

assessment of the liquor tax shown on the enclosed return, on the ground that the aforesaid liquor tax (H. R. S. Chapter 244) is repugnant to the Constitution and the laws of the United States, as applied to sales of liquor by Bacchus Imports.

Specifically, said liquor tax violates the Import and Export clause (Art. I, Section 10, Clause II) of the Constitution in so far as it requires Bacchus to pay any tax at the time of first sale of the liquor, and said tax further violates both said Import/Export clause and the Commerce clause (Art. I, Section 8, Clause III) by imposing an ad valorem rate of 20% on the wholesaler/importer's cost of freight, customs duties, and markup, thus discriminating in a substantial way against imports while at the same time exempting liquor (Okolehao) and fruit wines of Hawaii manufacture.

This protest applies to the entire amount of liquor tax paid by Bacchus since December 1977 and refund will be sought for such entire amount pursuant to H. R. S. (Section 244.-8).

Very truly yours,

By: John C. Graham, Jr.

Vice-President

(Caption Omitted)

COMPLAINT FOR REFUND OF LIQUOR TAXES
[Eagle Distributors, Inc.]

(Filed September 28, 1979)

I. PARTIES

1.01 Eagle Distributors, Inc. is a corporation organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii, with other places of business at Hilo, Kailua-Kona, Kahului, and Lihue, in the State of Hawaii. It is licensed

by the State of Hawaii as a wholesaler of beer and wine pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-796, and Wholesaler's Licenses for each of its locations, issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

1.02 Defendant George Freitas is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (Chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

II. JURISDICTION

2.01 For more than five years prior to the date hereof, plaintiff has filed with defendant each month as the same were due liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid the amount of tax shown on such return, in the total amount for the five year period August 1974-July 1979 of $10,744.047.00.

2.02 On August 31, 1979, plaintiff sent to defendant together with its liquor tax return and payment for the month of July, 1979, a letter protesting that payment and all payments of such tax over the previous five years, a true copy of which is attached hereto as Exhibit A and incorporated herein by reference.

2.03 This action has been commenced within thirty days from the date of such payment and protest, and with respect to such is brought pursuant to Section 40-35 of

the Hawaii Revised Statutes, under which Section this court has jurisdiction of this action.

2.04. Jurisdiction of this court as a Circuit Court of the First Circuit is also invoked pursuant to H. R. S. § 603-21.5 for the claim for refund of all payments of tax for the five years prior to August 31, 1979.

III. COUNT I—CLAIM UNDER ARTICLE I, SECTION 10, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

3.01 Plaintiff imports beer into the State of Hawaii, warehouses such beer on premises licensed by agencies of both the United States and the State of Hawaii, and sells such beer at wholesale.

3.02 Beer imported into Hawaii by plaintiff is manufactured in California or one of several other States, and shipped overland to the ports of Oakland or Los Angeles for shipment by ocean freighter to plaintiff.

3.03 All of such beer is imported in the cartons or cases in which it was originally packed and shipped, and is sold by plaintiff only in such original cartons or cases.

3.04 Such beer is purchased by plaintiff from its producer or from the agent of its producer.

3.05 Plaintiff's "wholesale price" for beer imported by it is determined by adding a percentage markup to its "landed cost" for such beer. Plaintiff's landed cost for such beer is determined by adding to its original cost (including Internal Revenue Taxes pursuant to 26 U. S. C. § 5051):

(1) Inland freight to the port of shipment to Honolulu;

(2) Container and wharfage charges at the port of loading, as charged by the shipping company;

(3) Ocean (or air, as the case may be) freight to Honolulu;

(4) Wharfage fees at Honolulu;

(5) Drayage charges for transportation to plaintiff's warehouse; and

(6) Warehouse handling charges.

3.06 Plaintiff sells beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

3.07 Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

3.08 The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; sake; various flavored fruit liquers; and a fruit wine made from pineapple. At present, all of

Hawaii's commercially available whisky, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

3.09 As applied to sales of beer by plaintiff, the Hawaii Liquor Tax is an unconstitutional State tax upon imports in that it discriminates against such beer in accordance with its place of origin since it specifically exempts Hawaii's only domestically produced liquors (except for liquers).

3.10 Furthermore, it interferes with the operation of the federal revenue laws by adding to the federal excise taxes on beer a surcharge of twenty percent, thereby taxing revenue of the federal government.

3.11 The Hawaii Liquor Tax further discriminates against imports in accordance with their place of origin by placing the heaviest tax burden on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii.

3.12 By thus discriminating against imports as such, the Hawaii Liquor Tax is a State-imposed duty on imports in violation of Article I, Section 10, Clause 2 of the United States Constitution.

VI. (sic) COUNT II—A CLAIM UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION

4.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.11 above are herewith realleged and incorporated in this Count II by reference.

4.02 The Hawaii Liquor Tax discriminates in the manner above-detailed against imports of beer from the other forty-nine states, and in so doing places an undue burden upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution.

V. (sic) COUNT III—A CLAIM UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION

5.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.11 above are herewith realleged and incorporated into this Count III by reference.

5.02 Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale malt beverages.

5.03 The imposition by the State of Hawaii of a tax upon the first sale by plaintiff of malt beverages imported by it into Hawaii is in derogation of plaintiff's federally licensed right to import, which, as the object of importation is sale, necessarily includes the right to make a first sale free from let or hindrance by any State.

5.04 The Hawaii Liquor Tax, as imposed on a first sale at wholesale of liquor imported by plaintiff into Hawaii, is accordingly an attempt to exercise a revenue-raising power in an area reserved to Congress under the United States Constitution, and as such is invalid under Article VI of said Constitution and under decisions of the United States Supreme Court consistently applied for over

one hundred and fifty years since the case of *Brown v. Maryland*, 12 Wheat. 419, in 1827.

WHEREFORE, plaintiff prays that judgment issue against defendant directing him to refund all liquor taxes paid by plaintiff from August, 1974 to the date of judgment, together with interest thereon as allowed by law, and for such other and further relief as may be fitting and just.

DATED: Honolulu, Hawaii, September 26, 1979.

/s/ Allan S. Haley
Attorney for Plaintiff

APPENDIX C

(Excerpts from Hawaii Revised Statutes)

§ 244-5 Statement of Tax as separate part of price. A dealer may state the amount of the tax accruing on a sale as a separate part of the price charged by him, but shall not be required to do so; however, section 281-83 shall not apply unless the amount of the tax has been so separately stated. [L 1939, c 222, § 6; RL 1945, § 5605; am L 1949, c 343, § 4; RL 1955, § 124-5]

§ 244-6 Return, form, contents. Every taxpayer shall, on or before the last day of each month, file with the department of taxation in the taxation district in which his business premises are located, or with the department in Honolulu, a return showing all sales of liquor made by him during the preceding month, showing separately the amount of the nontaxable sales, and the amount of the taxable sales, and the tax payable thereon. The return shall also show the amount of liquor used during the preceding month which is subject to tax, and the tax payable thereon. The form of return shall be prescribed by the department and shall contain such information as it may deem necessary for the proper administration of this chapter. [L 1939, c 222, § 8; RL 1945, § 5607; am L 1947, c 111, pt of § 14; am L 1949, c 343, § 6; RL 1955, § 124-6; am L Sp 1959 2d, c 1, § 16; am L 1966, c 19, § 4; am L 1967, c 37, § 1]

§ 281-83 Payment of liquor tax to be made. Whenever liquor is purchased by the holder of a retail, dispenser, club, cabaret, hotel, or vessel license from the holder of a manufacturer's or wholesale license, the amount added to the price on account of the tax imposed by chapter

244, as provided by section 244-5, shall be paid by the purchaser within twenty days after the end of the month in which the purchase has been made. On the failure to make the payment within such time the liquor commission may in its discretion suspend the license of the purchaser for a period of not more than ten days for the first failure and not more than twenty days for any subsequent failure.

The holder of a manufacturer's or wholesale license shall report the failure of a purchaser to comply with this section to the commission of the county in which the purchaser holds a license, in order that the suspensions provided by this section may be enforced by the commission. Any holder of a manufacturer's or wholesale license who fails to make such report may likewise be subject to the suspensions hereinabove provided [L Sp 1941, c 89; § 1 (e); RL 1945, § 7271; am L 1947, c 148, § 2; RL 1955, § 159-82; HRS § 281-83; am L 1976, c 87, § 3]

NO. 82-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., et al.,
Appellants,

vs.

GEORGE FREITAS,
Director of Taxation of the State of Hawaii, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR APPELLEE IN SUPPORT OF APPELLANTS

BRUCE C. BIGELOW*
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(808) 547-5400
(*Counsel of Record)

Attorneys for Appellee
in Support of Appellants
FOREMOST McKESSON, INC.,
dba McKESSON WINE &
SPIRITS CO.

September 1, 1983

QUESTIONS PRESENTED

1. Does a state tax of 20% ad valorem on the sale at the wholesale level of all liquor sold in Hawaii, which exempts certain locally produced liquors for the express purpose of fostering and protecting local industries, discriminate against imported liquors and constitute an undue burden on interstate and foreign commerce in violation of the Commerce Clause of the United States Constitution?

2. Does such a discriminatory state tax by taxing imports based on their place of origin constitute an impost or duty on imports prohibited by the Import-Export Clause of the United States Constitution?

3. Does such a discriminatory state tax, by exempting certain locally made liquors while taxing liquors imported from foreign and out-of-state sources by certain wholesalers, deny them the equal protection of the laws?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Supreme Court of Hawaii, Case No.7802, October Term 1979, were Bacchus Imports, Ltd., Eagle Distributors, Inc., Paradise Beverages, Inc. and Foremost-McKesson, Inc., dba McKesson Wine & Spirits Co., as Petitioners, and George Freitas, Director of Taxation of the State of Hawaii, as Respondent.

STATEMENT OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 28.1, Foremost-McKesson, Inc.,* doing business as McKesson Wine & Spirits Co., submits the following list naming all of its parent com-

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*Foremost-McKesson, Inc., changed its name to McKesson Corporation effective July 27, 1983. It continues to do business under the trade name McKesson Wine & Spirits Co.

panies, subsidiaries (except wholly owned subsidiaries) and affiliates:

City Properties, S.A.; Corporacion Bonima, S.A.; Intercal, Inc.; Mount Gay Distilleries, Ltd.; Organizacion Farmaceutica Americana, S.A.; Foremost-Baldwin Partners; Foremost Genetics Associates; Influential Homes Co.; Visitacion Associates; Foremost Dairies Company (Bangkok) Ltd.; Formac Trading (Taiwan) Ltd.; Taiwan Merchant Supply Co., Ltd.; Crockers Homes, A Joint Venture; Ditz-Crane Associates; Ditz-Crane of Arizona, A Joint Venture; Foremost Hawaiiana; Foremost H.P.I.; Foremost-McCormack Development; Jackson Albany Association; Norwalk Santa Fe Springs Associates; La Vascongada, S.A.C. e I.; Foremost Dairies (Taiwan) Ltd.; Calox Panamena, S.A.; Distribuidora Farmaceutica Calox Colombiana, S.A.; Foremost Dairies (Nigeria) Ltd.; Jamjoom-Foremost, Ltd.; Laboratories Calox, C.A.; Lebanese Foremost Dairies S.A.L.; Nosi Sales Corporation; and National Optical Services, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

United States Constitution

Statutes

Legislative Reports

Other Authorities

NO. 82-1565

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GEORGE FREITAS,
Director of Taxation of the State of Hawaii, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR APPELLEE IN SUPPORT OF APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawaii is reported in *Matter of Bacchus Imports, Ltd.*, 65 Hawaii ______, 656 P.2d 724 (1982).

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii, which sustained the validity of the Hawaii liquor tax statute, was entered on January 5, 1983. The notice of appeal was filed by appellants with the Hawaii Supreme Court on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution provides in part: "The Congress shall have power . . . [t]o regulate Commerce with foreign nations, and among the several states. . . ." U.S. Const. art. I, § 8, cl. 3.

Article I, Section 10, Clause 2 of the United States Constitution provides in part: "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports. . . . ." U.S. Const. art. I, § 10, cl. 2.

Section 1 of the Fourteenth Amendment provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 244-4 of the Hawaii Revised Statutes, as amended to date, provides in part:

> Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty per cent of the wholesale price of the liquor so sold or used; provided, that the tax shall be paid only once upon the same liquor; provided, further, that the tax shall not apply to:
>
> . . .
>
> (6) Okolehao manufactured in the State for the period May 17, 1971, to June 30, 1981; or

(7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981; or

(8) Rum manufactured in the State for the period May 17, 1981 to June 30, 1986.

STATEMENT OF THE CASE

Foremost-McKesson, Inc. (McKesson) is a Maryland corporation registered to do business in the State of Hawaii, and doing business as McKesson Wine & Spirits Co., a division of Foremost-McKesson, Inc. (Joint Appendix [hereinafter "J.A."] 18). It is licensed by the liquor commission for each county of the State of Hawaii as a liquor wholesaler pursuant to Hawaii Revised Statutes § 281-31 (Supp. 1982) and by the Department of Taxation for the State of Hawaii as a permittee pursuant to Hawaii Revised Statutes § 244-2 (Repl. 1976). (J.A. 18). Appellee George Freitas is the Director of Taxation of the State of Hawaii and, in such capacity, is charged with administering the Hawaii liquor tax for the State of Hawaii. (J.A. 18). *See generally* Hawaii Rev. Stat. §§ 244-1 *et seq.* (Repl. 1976).

McKesson imports foreign and domestic liquor into the State of Hawaii, warehouses such liquor on premises licensed by agencies of both the United States and the State of Hawaii, and sells such liquor at wholesale. (J.A. 19). Foreign-produced liquors are either shipped directly to Honolulu, Hawaii, or indirectly through other states. (J.A. 19-21). Domestic liquors are shipped from the other states. (J.A. 21).

Section 244-4 of the Hawaii Revised Statutes imposes a tax on the first sale at wholesale of liquor, at a rate of 20% of the wholesale price (which includes freight charges, customs duties

and federal taxes, and the wholesaler's markup).[1] The tax is payable by the wholesaler whether or not it is collected from the purchaser, and is assessed on monthly gross sales reported to the state. (J.A. 22). McKesson generally sells liquor to businesses in Hawaii at a price equal to its wholesale price plus the 20% tax imposed by Section 244-4, plus the 0.5% general excise tax imposed by Hawaii Revised Statutes § 237-13 (Supp. 1982). (J.A. 22).

Since 1960, Hawaii's legislature has enacted various exemptions from the liquor tax designed to foster local liquor industries. From 1960 to 1965, okolehao (a brandy distilled from the roots of the ti plant) produced in Hawaii was exempted from the tax.[2] This exemption expired in 1965, but was reenacted in 1971,[3] and extended again in 1976.[4] It expired in 1981. By the same act in 1976, a five-year exemption from the liquor tax was also granted to wine made in Hawaii from fruit grown in the state.[5] This exemption also lapsed in 1981. However, in its 1981 session, while the present case was pending

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[1] Wholesale price for imported liquors is determined by adding a percentage markup to its "landed cost" for such liquor. Landed cost is determined by adding the following costs to the original cost (F.O.B.) of the liquor:

(1) United States Customs duties (foreign liquors);
(2) United States Internal Revenue Service gallonage taxes;
(3) Customs brokerage fees;
(4) Inland freight to port of shipment to Honolulu;
(5) Ocean (or air) freight to Honolulu (including currency adjustment fees added by the shipment company);
(6) Wharfage fees at Honolulu;
(7) Drayage charges for transportation to the warehouse;
(8) Warehouse handling charges.

(J.A. 21-22).

[2] 1960 Hawaii Sess. Laws, c. 26, § 1.

[3] 1971 Hawaii Sess. Laws, c. 62, § 1.

[4] 1976 Hawaii Sess. Laws, c. 39, § 1; Hawaii Rev. Stat. § 244-4(6) (Supp. 1982).

[5] 1976 Hawaii Sess. Laws, c. 39, § 1; Hawaii Rev. Stat. § 244-4(7) (Supp. 1982).

before the Hawaii Supreme Court, the legislature enacted a new exemption for "[r]um manufactured in the State for the period May 17, 1981 to June 30, 1986."[6]

The rate of the tax has been steadily increased over the years to the present rate of 20%. Originally, the tax was imposed at the rate of 6% of sales at retail or wholesale if the sale was directly to the consumer.[7] In 1947, the rate was raised to 8%.[8] Two years later, responsibility for payment of the tax was shifted from the retailers to the wholesalers, and the rate was increased from 8 to 12%.[9] In 1957, the rate was further increased to 16%.[10] Lastly, in 1965, the rate was raised to the current 20%.[11]

On September 6, 1979, McKesson protested the assessment of the liquor tax by a letter directed to the Department of Taxation. (J.A. 19).[12] Shortly thereafter, it filed suit seeking a refund of taxes paid since August, 1974. (J.A. 19). The complaint alleged, among other things, that the Hawaii liquor tax discriminated in favor of locally produced liquor in contravention of the Import-Export, Commerce and Equal Protection Clauses of the United States Constitution.

The case was consolidated with similar suits filed by Bacchus Imports, Ltd., Eagle Distributors, Inc., and Paradise Beverages, Inc. (hereinafter collectively referred to as "taxpayers"), and was heard on stipulated facts in the Hawaii Tax

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[6] 1981 Hawaii Sess. Laws, c. 182, § 1; Hawaii Rev. Stat. § 244-4(8) (Supp. 1982).

[7] 1939 Hawaii Sess. Laws, c. 222, § 5.

[8] 1947 Hawaii Sess. Laws, c. 111, § 14[b].

[9] 1949 Hawaii Sess. Laws, c. 343, § 3.

[10] 1957 Hawaii Special Sess. Laws, c. 1, § 7 [b].

[11] 1965 Hawaii Sess. Laws, c. 155, § 8.

[12] Payment of taxes under protest, and subsequent suit for their refund, is provided for in Hawaii Rev. Stat. § 40-35 (Supp. 1982). The taxes paid with the protest and all subsequent taxes paid during the pendency of this action were deposited into an escrow known as the "litigated claims fund." Depending upon the outcome of this appeal, the taxes in the fund will either be returned to the taxpayers or become a realization of the state.

Appeal Court. The court upheld the tax, ruling against the taxpayers' constitutional claims. The taxpayers then appealed to the Hawaii Supreme Court, which continued the consolidation effected by the Tax Appeal Court.

In its opinion and by single judgment against all of the taxpayers in the consolidated suit, the Hawaii Supreme Court rejected each of the constitutional challenges and sustained the validity of the tax. A timely appeal to this Court from the consolidated judgment was filed by Bacchus Imports, Ltd., and Eagle Distributors, Inc. McKesson and Paradise Beverages, Inc., did not file separate appeals, but are parties to the appeal pursuant to Rule 10.4 of the Supreme Court Rules.

SUMMARY OF ARGUMENT

The State of Hawaii imposes an excise tax on the first sale at wholesale of all liquor sold or used in the state. The tax rate is 20% of the wholesale price of the liquor so sold or used, and is payable monthly by the wholesaler. To promote the development and growth of the state's economy, Hawaii has granted five-year renewable exemptions from the tax to various local liquor industries. The exemptions confer a significant, albeit artificial, cost advantage on the favored local products versus out-of-state products subject to the tax.

A. *Commerce Clause*. By exempting locally manufactured products from the imposition of its liquor tax, Hawaii violates the Constitution. The exemptions provide a substantial and "direct commercial advantage to local business" in contravention of the Commerce Clause. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 329 (1977). This Court has long held that the Commerce Clause does not permit a state to encourage the development of its local industry by means of taxing measures which, like the Hawaii tax, impose greater economic burdens on products produced outside the state than are imposed on similar products produced within the state. Indeed, such simple economic protectionism is subject to a "virtually per se rule of invalidity," *Philadelphia v. New*

Jersey, 437 U.S. 617, 624 (1978), since the "basic purpose" of the Commerce Clause is "to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981).

The lower court justified the discrimination against out-of-state products by finding that the "incidence of the tax is on wholesalers in Hawaii and the ultimate burden is borne by consumers in Hawaii." *Matter of Bacchus Imports, Ltd.*, 65 Hawaii ______ , 656 P.2d 724, 734 (1982). The fact that an otherwise discriminatory tax is imposed on a local event at the end of the interstate commerce has never been a defense to a Commerce Clause challenge. "[T]he commercial power [of the federal government] continues until the commodity has ceased to be the subject of discriminatory legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 332 n.12 (quoting *Welton v. Missouri*, 91 U.S. 275, 282 (1876)).

Nor can the liquor tax be justified by the lower court's assumption that the exempted liquor does not pose a "competitive threat" to liquor produced out-of-state. First, the lower court failed to realize that the test is not the extent of the discrimination, but whether discrimination exists. "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760. Second, a dollar-and-cents comparison of the actual tax burden on liquors produced in-state and out-of-state shows that the Hawaii tax unconstitutionally discriminates against the latter. For example, given the pyramid effect of the tax, a case of California wine with a F.O.B. cost of $10.00 per bottle would incur a tax of $56.40 upon its sale in Hawaii. No tax would be assessed on a sale of like wine produced in Hawaii. Such an inequality of tax burden is plainly discriminatory within the meaning of this Court's Commerce Clause cases.

Finally, the lower court ignored several early decisions of

this Court, in particular, *Walling v. People of Michigan*, 116 U.S. 446 (1886), which clearly established that no state may, consistent with the Commerce Clause, discriminatorily tax the products of other states or persons engaged in the sale of such products. In view of these precedents, it may be said of the Hawaii tax, as it was of the tax at issue in *Walling*, "[i]f this is not a discriminating tax levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax which would be discriminating." 116 U.S. at 454.

B. *Import-Export Clause*. Under the test established in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 289 (1976), a state tax which falls on imports must be invalidated if, among other things, it usurps the exclusive federal authority to regulate foreign commerce or deprives the federal government of import revenues. The disparate tax treatment accorded in-state and foreign liquors creates, in practical effect, a preferential trade area for locally produced liquor. This is plainly inconsistent with the constitutional requirement that the nation speak "with one voice" in its commercial relations with foreign governments. Further, the high rate of the tax and its pyramid effect reduces the demand for foreign liquor which, in turn, decreases the volume of imports and the federal government's import revenues. The tax is, therefore, invalid under *Michelin* as an impost or duty prohibited by the Import-Export Clause.

C. *Equal Protection Clause*. The liquor tax denies the equal protection of the laws to out-of-state liquor manufacturers and wholesalers of out-of-state liquor by taxing liquor sales based solely on the origin of the liquor. *See Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1948); *WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119-20 (1968). Since the sole purpose of the classification is simple economic protectionism, the Equal Protection Clause must be applied "to give effect to its role to protect our federalism" by denying Hawaii "the power constitutionally to discriminate in favor of its own residents against the other state members of our federation." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 533 (Brennan, J., concurring) (1959).

ARGUMENT

I. THE HAWAII LIQUOR TAX BY ITS TERMS, IN OPERATION, AND IN ACCORDANCE WITH EXPRESS LEGISLATIVE INTENT, DISCRIMINATES AGAINST INTERSTATE AND FOREIGN COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

The prohibition against state taxes which discriminate against interstate commerce has been a fundamental tenet of Commerce Clause doctrine from the beginning. The rule "follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The clear trend in the Court's recent decisions has been to permit the states broad discretion in forcing interstate commerce to "pay its own way."[13] The Court has, accordingly, shown increasing deference to state assertions that a questioned tax has a sufficient nexus with[14] or is fairly apportioned to[15] the taxing state. In distinct contrast to this trend, there has been no corresponding liberalization of Commerce Clause restrictions on discriminatory state taxation. In decisions covering more than 100 years of Commerce Clause analysis, this Court has

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[13] *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Cf. Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

[14] *See, e.g., National Geographic Society v. State Board of Equalization*, 430 U.S. 551 (1977); *Standard Pressed Steel Co. v. Washington Revenue Department*, 419 U.S. 560 (1975); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1978).

[15] *See, e.g., Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Moorman Manufacturing Co. v. Blair*, 437 U.S. 267 (1978).

steadfastly adhered to the constitutional policy of free trade and competition among the states. The principle first articulated in *Welton v. Missouri*, 91 U.S. 275 (1876) remains true today: "No State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). The reason is plain. Discriminatory state taxation creates, in practical effect, a tariff destructive of the free flow of commerce among the states.

Accordingly, any state tax which, by its terms or practical operation, imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the Commerce Clause. Hawaii's liquor tax is such a discriminatory tax.

A. THE HAWAII LIQUOR TAX INTENTIONALLY EFFECTS DISCRIMINATION.

The legislative history of the liquor tax exemptions makes their purpose clear: To promote the development and growth of specified state liquor industries by providing five-year renewable tax exemptions which grant the favored local products a substantial cost advantage over out-of-state products. The purpose of the original 1960 exemption for okolehao was stated to be "to encourage and promote the establishment of a new industry."[16] When the exemption was reenacted in 1971, the legislature expressed the hope that "the taxes temporarily saved by [the okolehao manufacturers] may be channelled into national promotion and competitive pricing, the result of which is

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[16] S. Stand. Comm. Rep. Nos. 87 and 222, 1st Hawaii State Leg., Budget Sess. (1960), *reprinted in* 1960 Hawaii Sen. Journal 224, 256 (Appendices A and B). *See also* H. Stand. Comm. Rep. No. 322, 1st Hawaii State Leg., Budget Sess. (1960), *reprinted in* 1960 Hawaii House Journal 373 (Appendix C).

a linking of okolehao to Hawaii as tequila is to Mexico."[17] The 1976 extension of the okolehao exemption and the enactment of an additional exemption for the local wine industry was justified by the Hawaii Senate Ways and Means Committee as follows:

> The purpose of this bill is to extend the exemption of okolehao manufactured in the State from the liquor tax for an additional five years, to June 30, 1981. It is hoped that this five-year extension will aid the local okolehao industry [sic] get on a firm financial foundation.
>
> Your Committee has amended this bill to provide a similar five-year exemption to the local fruit wine industry. Testimony received indicates that there may be an economic potential to the State in this area which, hopefully, this bill can help stimulate.[18]

The Conference Committee Report on the most recent exemption, for Hawaii-manufactured rum, evidences the Legislature's continued use of its tax system to benefit local manufacturers:

> The purpose of this bill is to exempt rum manufactured in the State from the liquor tax for five years. . . . Your Committee is aware of the consolidated cases in the State Tax Appeal Court, Civil Nos. 1852, 1862, 1866 and 1867, under the name *Bacchus Imports, Ltd., et al. v. Freitas,* currently pending in the State Supreme Court, regarding the validity of certain liquor tax exemptions, and has had extensive discussions with the Attorney General's Office and the State Tax Department regarding the cases. Your Committee also notes that opinions conflict as to whether or not the national tax structure provides an advantage to rum produced in Puerto Rico and therefore makes no findings on

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[17] H. Stand. Comm. Rep. No. 246, 6th Hawaii State Leg., Reg. Sess. (1971), *reprinted in* 1971 Hawaii House Journal 793-94 (Appendix D).

[18] S. Stand. Comm. Rep. No. 408-76, 8th Hawaii State Leg., Reg. Sess. (1976), *reprinted in* 1976 Hawaii Senate Journal 1056 (Appendix E). *See also* H. Stand. Comm. Rep. No. 689-76, 8th Hawaii State Leg., Reg. Sess. (1976), *reprinted in* 1976 Hawaii House Journal 1590 (Appendix F).

> that issue. *Your Committee does feel, however, that providing a tax incentive in the form of a liquor tax exemption for a period of years is an appropriate method of encouraging the development of a new industry in the State and is therefore in agreement with the intent of the bill.*[19]

Consistent with this history, the Hawaii Supreme Court found that the okolehao and wine exemptions were specifically intended to benefit local producers, concluding that "[n]o one could quarrel with the proposition that the promotion of domestic industry is a legitimate state purpose." *Matter of Bacchus Imports, Ltd.*, 656 P.2d at 730. While the court's comment might be relevant to an Equal Protection Clause analysis, it is well settled that discriminatory legislation cannot be justified under the Commerce Clause as a measure to assure the economic health of local industry. As Mr. Justice Blackmun stated in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980):

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

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[19] S. Conf. Comm. Rep. No. 29, 11th Hawaii State Leg., Reg. Sess. (1981), *reprinted in* 1981 Hawaii Senate Journal 1056 (emphasis added) (Appendix H). *See also* H. Conf. Comm. Rep. No. 31, 11th Hawaii State Leg., Reg. Sess. (1981), *reprinted in* 1981 Hawaii House Journal 911-12 (Appendix G).

Indeed, such "simple economic protectionism" is subject to a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[20]

Where, as here, the state baldly announces its intent to confer a direct economic benefit upon local manufacturers by utilizing the liquor tax as a protective tariff against out-of-state products and justifies this policy on grounds repeatedly rejected by this Court, the tax is obviously repugnant to the Commerce Clause.

B. THE HAWAII LIQUOR TAX IS A CLASSIC EXAMPLE OF DISCRIMINATORY TAXATION.

The Hawaii Supreme Court held that "[t]he taxpayers have failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce." *Matter of Bacchus Imports, Ltd.*, 656 P.2d at 735. This conclu-

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[20]*See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (New York statute excluding Vermont milk held invalid); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (New York required to permit state milk producer to export milk to other states, though price increases may result in New York). The *Baldwin* decision is particularly pertinent. After holding that the Commerce Clause prohibits obstructions to competition between the states, Mr. Justice Cardozo expressly rejected the proposition that such obstructions may be justified as measures to assure the economic health of local industry:

> If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.
>
> . . .
>
> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

294 U.S. at 522-23.

sion misreads this Court's recent Commerce Clause decisions[21] and ignores its earlier, and dispostitive, cases.[22] Indeed, one of the early cases, *Walling v. People of Michigan*, 116 U.S. 446 (1886), is identical in all material respects to the present case. In striking down the tax there at issue, the Court made an observation which is equally applicable here: "If this is not a discriminating tax levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax which would be discriminating." *Id.* at 454.

1. The Federal Precedents Compel The Invalidation Of The Hawaii Liquor Tax.

In a series of cases commencing with *Welton v. Missouri*, 91 U.S. 275 (1876) and ending with *I. M. Darnell & Son Co. v. Memphis*, 208 U.S. 113 (1908), this Court considered a number of state tax schemes similar to the Hawaii liquor tax. As in the present case, the state statutes at issue imposed taxes on merchants selling goods produced out-of-state, and exempted similarly situated merchants selling locally produced goods. In each case, this Court held that the taxes were discriminatory and invalidated them under the Commerce Clause.

In its *Welton* decision, the Court struck down as discriminatory a Missouri license tax which applied to peddlers of goods which were "the growth, product or manufacture of other States or countries," but did not apply to peddlers selling merchandise which was "the growth, product or manufacture" of Missouri. 91 U.S. at 275. The Court grounded its ruling on the necessity to prevent an economic Balkanization of the nation:

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[21] *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963).

[22] *I. M. Darnell & Son Co. v. Memphis*, 208 U.S. 113 (1908); *Walling v. People of Michigan*, 116 U.S. 446 (1886); *Guy v. Baltimore*, 100 U.S. 434 (1880); *Welton v. Missouri*, 91 U.S. 275 (1876).

> The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

Id. at 281.

The Court reached the same conclusion a few years later in *Guy v. Baltimore*, 100 U.S. 434 (1880). There, the Court invalidated an ordinance of the City of Baltimore, authorized by a Maryland statute, which assessed wharfage fees against vessels which landed at the city's public wharves laden with the products of other states, but not against vessels landing there with the products of Maryland. Citing *Welton* and earlier decisions by the Court, Mr. Justice Harlan declared that "it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein . . . of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory." 100 U.S. at 439. To concede such power to the states "would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.* at 442.

The Court's next decision, *Walling v. People of Michigan*, 116 U.S. 446 (1886), deserves close scrutiny because it is, in all material respects, analogous to the present controversy. In that case, the State of Michigan imposed a tax on persons selling at wholesale, or soliciting orders for, liquor manufactured in other states, without imposing a like tax upon persons engaged in the

same business in reference to liquor manufactured in the state. Walling, a traveling wholesale salesman for an out-of-state manufacturer, challenged the validity of the tax. Mr. Justice Bradley, for a unanimous court, concluded that the violation of the Commerce Clause was beyond reasonable dispute:

> . . . [I]t is very difficult to find a plausible reason for holding that it [the tax] is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. *If this is not a discriminating tax levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating.* It is clearly within the decision of *Welton v. Missouri* . . . .

116 U.S. at 454 (emphasis added).[23] McKesson, like Walling, is a wholesaler representing out-of-state manufacturers. It must pay tax on all of its sales whereas wholesalers representing the favored state manufacturers pay no tax. As in *Walling*, such differential taxation of liquor based on its origin is a "regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States." 116 U.S. at 455.

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[23]In his opinion, Mr. Justice Bradley referred to state decisions acknowledging the states' lack of authority to prescribe regulations on articles in commerce based on their place of origin. His discussion of a decision of the Supreme Court of Missouri is particularly relevant to the issues in this case:

> In *State v. North*, 27 Mo. 464, where an Act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, product or manufacture of that State, and manufactured articles the growth or product of other States, it was held by the Supreme Court of that State that the law was unconstitutional and void. The court says: "From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the States, in the exercise of the right of taxation, to discriminate between

I.M. Darnell & Son Co. v. Memphis, 208 U.S. 113 (1908), rounds out the Court's early decisions. The Darnell Company operated a mill in Tennessee purchasing logs from both within and without the state. The disputed personal property tax was assessed against Darnell's inventory of logs purchased from out-of-state sources, but, based on an exemption, not against logs procured in Tennessee. The tax was declared unconstitutional on the ground that it "was a direct burden on interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the State of Tennessee, by exempting like property when produced from the soil of Tennessee." 208 U.S. at 126.

Welton, Guy, Darnell and particularly *Walling* are dispositive of the issues raised by this appeal. When Hawaii's legislature sought to encourage the development of its local liquor industry by enactment of taxing measures disadvantaging out-of-state manufacturers, it resurrected the precise taxing scheme condemned in each of these decisions. *Welton* and its progeny, therefore, compel the invalidation of Hawaii's liquor tax law.

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products of this State and those manufactured in our sister States." And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: "But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the States is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences."

116 U.S. at 457-58 (citations omitted).

While this Court's recent decisions have allowed the states greater leeway in exercising their taxing powers,[24] the Court plainly has not retreated from the antidiscrimination principle established in the *Welton* line of cases. Rather, the Court has continued to be zealous in setting aside any state tax which by its terms or in practical operation favors local over out-of-state interests. *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). Indeed, the chief feature distinguishing the earlier from the more recent cases is that the state laws in question are usually more artfully drawn to disguise the discrimination.

The Court's decisions in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) and *Maryland v. Louisiana*, 451 U.S. 725 (1981), are illustrative.

In *Boston Stock Exchange*, New York had amended its stock transfer tax so that the tax payable by nonresidents was reduced by 50% when the transaction involved an in-state sale, but not when it involved an out-of-state sale. Also, a maximum of $350.00 was applied to limit the tax on a single transaction (by either a resident or a nonresident) when the sale took place in-state, but not when it took place elsewhere. In his opinion for a unanimous Court, Mr. Justice White reiterated that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." 429 U.S. at 328. To permit "the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id.* at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)). Surveying the Court's decisions balancing the national interest in free trade with the interest of the states in exercising their taxing powers, Mr. Justice White noted:

> This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v.*

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[24] *See* cases cited *supra* notes 13 and 14.

> *Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "From the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.* at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State may, consistent with the Commerce Clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.*

429 U.S. at 329. The transfer tax amendment was, accordingly, held unconstitutional. Because it "foreclose[d] tax-neutral decisions and create[d] both an advantage for the [stock] exchanges in New York and a discriminatory burden on commerce to its sister States," *Id.* at 331, the tax violated the principle that "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 337.[25]

Similarly, in *Maryland v. Louisiana*, 451 U.S. at 725, Louisiana imposed a tax on the "first-use" of natural gas brought into the state which had not previously been taxed by another state or by the United States. Through a series of exemptions and credits, Louisiana users of the natural gas were generally not burdened by the tax, while it uniformly applied to gas moving out of the state to consumers in the rest of the country. *Id.* at 732-33. The Court struck down the tax, holding that it "unquestionably discriminates against interstate commerce in favor of local interests." *Id.* at 756.

Maryland v. Louisiana and *Boston Stock Exchange* thus reaffirm the principle first established in *Welton, Guy, Walling*

[25] *See also Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963), in which the Court considered a Louisiana use tax which was applied to an out-of-state taxpayer's labor and shop overhead costs associated with assembling specialized equipment that was brought into the state for use in the taxpayer's business. These costs would have been excluded from the tax base had the taxpayer assembled the equipment in Louisiana. Applying a "strict rule of equality," the Court set aside the tax as discriminatory against products assembled out-of-state. 373 U.S. at 73.

and *Darnell* that discriminatory state taxation is subversive of the most fundamental economic principles embodied in the Constitution. The Court has made no changes in doctrine or other departures from the earlier cases. A state tax which provides "a direct commercial advantage to local business" is *per se* invalid.[26]

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[26]State court decisions in other jurisdictions have consistently applied this principle and invalidated discriminatory taxes under the Commerce Clause. *See, e.g., Archer Daniels Midland Co. v. State*, ______ Minn. ______, 315 N.W.2d 597 (1982); *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979); *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623 (Me. 1981); *American Modulars Corp. v. Lindley*, 54 Ohio St. 2d 273, 376 N.E.2d 575 (1978); *State, Dept. of Fisheries v. Dewatto Fish Co.*, 34 Wash. App. 135, 660 P.2d 298 (1983).

In *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, Minnesota's Supreme Court declared unconstitutional a portion of a statute which provided for a four-cent per gallon reduction in a gasoline excise tax for gasohol produced and distilled in Minnesota. The court held that the tax was *per se* invalid since it facially discriminated against out-of-state gasohol by placing a more onerous tax burden on such products simply because of their origin in another state. 315 N.W.2d at 599. The court also found the tax unconstitutional under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). First, the tax statute did not regulate even-handedly. Second, the statute did not serve legitimate local interest such as public safety which may justify state regulation of interstate commerce. Rather, as in the present case, the statute attempted "to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power." 315 N.W.2d at 599. The court concluded, therefore, that the statute "imposes a burden on interstate commerce which is clearly excessive in relation to the local benefit." *Id.*

In *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, the Supreme Judicial Court of Maine struck down a truck tax which required owners and operators of foreign based trucks using state highways to purchase highway use permits, but which exempted entirely from tax gasoline-powered trucks based in state. The court found that the tax was invalid on its face because it discriminated against interstate commerce, since it set much higher permit fees for foreign-based trucks than for Maine-based ones. The court also noted the lower court finding that the statute was even more discriminatory in its practical effect than it appeared on its face, because it increased the average per-mile operating costs for

2. The Hawaii Supreme Court Failed To Follow The Federal Law.

Despite the patently discriminatory legislative purpose of the liquor tax and its inevitable practical effect, the Hawaii Supreme Court concluded that "[t]he taxpayers have failed to demonstrate that the Hawaii Liquor Tax . . . works discrimination against interstate commerce." *Matter of Bacchus Imports, Ltd.*, 656 P.2d at 735.

The lower court's fundamental error is that it failed to recognize that the Commerce Clause forbids precisely the sort of economic protectionism which the Hawaii liquor tax fosters. Indeed, as *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970) makes clear, the fact that the tax exemptions are intended "to preserve or secure employment for the home State," as they are here, is further proof of their unconstitutionality. A state may not use its power to tax or to regulate business " 'to divert to [itself] employment and business which might otherwise go' " elsewhere; " 'the necessary tendency' " of such enactments " 'is to impose an artificial rigidity on the economic pattern of the industry.' " *Id.* at 146 (quoting *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948)).[27]

Perhaps as a consequence of its misperception of the thrust of the Commerce Clause cases, the Hawaii Supreme Court

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foreign-based trucks 200 times more than it did for trucks registered in Maine. 437 A.2d at 626.

In *Dayton Power & Light Co. v. Lindley*, 391 N.E.2d 716, the Supreme Court of Ohio invalidated an Ohio coal consumption tax which imposed higher taxes on low sulphur coal than on high sulphur coal. Since Ohio produced predominantly high sulphur coal and very little low-sulphur coal the Court found that the practical effect of the tax was to encourage the purchase of Ohio high sulphur coal and discourage the purchase of out-of-state low sulphur coal. *See also Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979).

[27] *See also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523-24 (1935), discussed *supra* note 20 and accompanying text.

misread this Court's holdings in *Maryland v. Louisiana, Boston Stock Exchange* and *Halliburton.*

The former was distinguished by the lower court as follows: "Unlike the situation in *Maryland v. Louisiana, supra,* the incidence of the tax here is on wholesalers of liquor in Hawaii and the ultimate burden [of the tax] is borne by consumers in Hawaii." *Matter of Bacchus Imports, Ltd.,* 656 P.2d at 734. This ostensible distinction misses the point of the Commerce Clause cases. The discrimination created by the Hawaii tax scheme is directed against out-of-state products and the manufacturers of those products. Their products, solely by reason of their foreign origin, are subject to a significant tax burden whereas the products of domestic manufacturers are not. This is plainly the selfsame discrimination condemned in *Welton, Guy, Walling, Darnell* and *Halliburton.* That the ultimate tax burden fell on local consumers did not save the otherwise objectionable tax schemes. Indeed, Mr. Justice White specifically noted that "the statutes at issue in those cases [including, among others, *Welton* and *Halliburton*] had the primary effect of prohibiting or discriminatorily burdening a resident's purchase of out-of-state goods and services." *Boston Stock Exchange v. State Tax Commission,* 429 U.S. at 336.

That the liquor tax is paid by wholesalers in Hawaii is likewise no ground of distinction. A state tax is not immune from challenge simply because it is imposed on a local event or local entities at the end of interstate commerce. This point was made manifest in *Boston Stock Exchange:*

> Because of the discrimination inherent in § 270-a [the transfer tax], we also reject the Commission's argument that the tax should be sustained because it is imposed on a local event at the end of interstate commerce. While it is true that, absent an undue burden on interstate commerce, the Commerce Clause does not prohibit the States from taxing the transfer of property within the State, the tax may not discriminate between transactions on the basis of some interstate element. As was held in *Welton v. Missouri,* 91 U.S. 275, 282 (1876): "[T]he commercial power [of the Federal Government] continues until the commodity has

> ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."

429 U.S. at 332 n.12 (citations omitted).[28] *See also I. M. Darnell & Son Co. v. Memphis*, 208 U.S. at 113 (where the incidence of the tax was clearly borne by local merchants and where, just as clearly, it made no difference in the outcome of the case).

The *Boston Stock Exchange* and *Halliburton* decisions, while discussed by the Hawaii Supreme Court, were quickly dismissed as factually inapposite. *Matter of Bacchus Imports, Ltd.*, 656 P.2d 734-35. While it is obvious that New York's transfer tax and Louisiana's use tax are factually dissimilar to Hawaii's liquor tax, the antidiscrimination principle articulated in those decisions is directly applicable to the constitutional question posed by Hawaii's law. Further, the lower court chose to ignore the cases most directly on point: *Welton, Guy, Walling* and *Darnell*. It commented merely that its "survey of the case law of Commerce Clause litigation in the Supreme Court has uncovered no instance where a state tax of similar nature has been voided." *Matter of Bacchus Imports, Ltd.*, 656 P.2d at 735.

In one further effort to distinguish the federal precedents, the Hawaii Supreme Court implied that the extent of the discriminatory impact of the Hawaii liquor tax is insubstantial and that the tax therefore does not violate the Commerce Clause. 656 P.2d at 735. To reach this conclusion the court "assume[d]" that okolehao and pineapple wine sold in Hawaii involve an insubstantial volume of commerce and thus "pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii." *Id.* at 735 n. 21. It also noted its belief that these products are unique to Hawaii. *Id.* at 735 n. 20. Even assuming, for the sake of argument, that the Hawaii Supreme

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[28] *See also* Mr. Justice Harlan's discussion of this issue in *Guy v. Baltimore*, 100 U.S. at 443.

Court is correct in these assumptions,[29] they have no relevance to the question before this Court.

First, as early as *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), the Court established that the constitutionality of a state tax does not turn on the extent of the alleged discrimination:

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.

25 U.S. (12 Wheat.) at 439. More recently, in *Maryland v. Louisiana*, 451 U.S. at 725, this Court granted judgment on the pleadings to the taxpayers challenging the first use tax. In so ruling, the Court rejected the recommendations of its Special Master that further evidentiary hearings be conducted to determine the extent of the discrimination effected by the tax:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. *We need not know how unequal the Tax is before concluding it unconstitutionally discriminates.*

451 U.S. at 759-60 (emphasis added). The inquiry, then, is not the degree of discrimination, but whether discrimination exists.

This rule is clearly salutary. Drawing the constitutional line between a valid and invalid state tax on the basis of the existence

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[29] Such assumptions would clearly *not* be appropriate for rum since it is a very popular liquor and is manufactured in many parts of the United States and the world. As noted earlier, locally manufactured rum was granted a tax exemption by the Hawaii legislature in 1981 and, accordingly, was being sold in the Hawaii market when this matter was heard by the Hawaii Supreme Court. Since rum was not manufactured in Hawaii when this action was begun (J.A. 16), any success the local industry now enjoys would appear to be directly traceable to its tax exempt status.

of a "competitive threat" measured by the volume of commerce actually affected is unsound. The constitutionality of a particular tax statute could fluctuate from year to year or even month to month depending upon changes in the marketplace or the fortunes of a particular business.[30] This is an unworkable standard for judicial review. The state's authority to tax would turn on an economic analysis of the cross-elasticity of demand in the relevant market. Proof would necessarily include volume of sales, market shares, pricing trends and the like. The outcome would be determined not by consistently applied constitutional principles, but by the vagaries of the economy.

Second, in determining whether discrimination exists, this Court has compared the actual tax burden on in-state and out-of-state goods or services with respect to a particular transaction.[31] As noted in *Halliburton Oil Well Co. v. Reily*, "equality [of tax treatment] for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." 373 U.S. at 70.

A dollars-and-cents comparison of the actual tax burden on in-state and out-of-state liquors shows that the Hawaii tax imposes a substantially greater burden on the latter. According to the Stipulation of Facts filed in the Hawaii Tax Appeal Court, a case of California wine priced at $10.00 a bottle (F.O.B. at the

[30] For example, if the discriminatory effect of the okolehao exemption was measured in 1960, the year of its initial enactment, it is likely that no competitive effect would be found. If, however, the effect was determined in 1981, the last year of its several exemptions, the result might be considerably different.

[31] *See Boston Stock Exchange*, 429 U.S. at 334; *Maryland v. Louisiana*, 451 U.S. at 757 n. 28; *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1951); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

winery) would cost the Hawaii consumer $285.60.[32] The portion of this figure represented by the 20% Hawaii liquor tax is stipulated to be $56.40.[33] By contrast, a wholesaler selling wine manufactured in Hawaii is not subject to any liquor tax. Such a large tax penalty for selling out-of-state liquor cannot be deemed to have no practical effect on interstate commerce. *See Boston Stock Exchange*, 429 U.S. at 334.

A tax burden of $56.40 for a single case of wine is at least equal to the discriminatory burdens condemned in many of the Commerce Clause cases. For example, in *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1951), this Court found discriminatory a $50 license tax on each truck used by an out-of-state laundry business soliciting and picking up business in Mississippi because resident laundries were required to pay only $8 per truck. Similarly, in *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), a discrepancy between the $1 annual tax paid by local merchants and the $250 annual tax paid by itinerant solicitors was found discriminatory. And in *Maryland v. Louisiana*, the Court used an example "to illustrate the possible discrimination" of the credit feature of the first use tax in which the tax differential was only $35. 451 U.S. at 757 n. 28. *See also Boston Stock Exchange*, 429 U.S. at 334.

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[32] Due to its *ad valorem* nature, the Hawaii liquor tax is assessed against every item of expense which is included in the cost of the wine to the consumer. These expenses include the producer's costs, freight, wharfage fees, drayage charges, warehousing charges, federal taxes, wholesaler's mark-up and, in the case of foreign wines, customs duties and brokerage fees. Stipulation of Facts ¶ 13. (J.A. 21-22). The Stipulation states that each increase of $1.00 in the producer's cost for a case of California wine (F.O.B. the winery) results in a price to the Hawaii consumer of $2.38. Stipulation of Facts ¶ 19. (J.A. 23). Hence a case of California wine with a F.O.B. price of $120.00 (12 bottles × $10.00 per bottle = $120.00) will cost $285.60 in Hawaii. ($120.00 × 2.38 = $285.60).

[33] Stipulation of Facts ¶ 19. (J.A. 23). The portion of the cost to the consumer attributable to the liquor tax is agreed to be $0.47 per $1.00 of F.O.B. price, which calculates to a tax of $56.40 on the case of wine posited in the example. ($120.00 × .47 = $56.40).

Thus, contrary to the belief of the Hawaii Supreme Court, the inequality of treatment accorded in-state and out-of-state products by Hawaii's liquor tax is discriminatory within the meaning of the Commerce Clause cases.

The obvious economic effect of such inequality of treatment is to encourage out-of-state business to relocate in Hawaii and to engender retaliatory taxes by other states.[34] The avoidance of a 20% tax on wholesale value is a strong incentive to relocate to Hawaii. Encouraging out-of-state business to relocate in-state by discriminating in favor of in-state transactions or goods produced in-state is violative of the Commerce Clause. In *Maryland v. Louisiana*, 451 U.S. at 725, for example, this Court found that an "obvious economic effect" of Louisiana's severance tax credit was to encourage outer continental shelf gas producers "to invest . . . within Louisiana rather than to invest in further OCS development or in production in other States." 451 U.S. at 756. This relocation incentive contributed to the Court's holding that the Louisiana tax unconstitutionally discriminated "against interstate commerce in favor of local interests," *Id.* at 756. Similarly, in *Boston Stock Exchange*, 429 U.S. at 318, the Court found that the "obvious effect" of the New York stock transfer tax was to "extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." 429 U.S. at 331.

In addition to its relocation incentive, Hawaii's discriminatory liquor tax encourages retaliatory actions by other states. Indeed, the Hawaii legislation here at issue appears to be symptomatic of a trade war which is gaining momentum in the

[34]The "practical operation" of a tax statute is to be assessed in terms of the statute's "actual and potential" discriminatory effect. *Nippert v. Richmond*, 327 U.S. 416, 424 n. 9 (1940) ("It is old doctrine, notwithstanding many early deviations, that the practical operation of the tax, *actual* or *potential*, rather than its descriptive label or former character is determinative.") (emphasis added and citations omitted). The Court has continued its scruntiny of potential effects by focusing on the "obvious economic effect" of a tax. *Maryland v. Louisiana*, 451 U.S. at 756-57; *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 331.

nation's liquor industry. At the present time, at least 20 states have adopted liquor tax statutes which discriminate in favor of locally produced liquor.[35] The recently enacted Maryland statute is typical: Wine produced by certain wineries from locally grown fruit is taxed at the rate of two cents per gallon, while out-of-state wine pays a tax of forty cents per gallon. Md. Ann. Code, art. 4, §§ 133(b)(1) and 133(g) (Supp. 1982). Moreover, the existence of these barriers to free trade has prompted a number of states to enact retaliatory taxes on liquors from states which discriminate against their products.[36] The prevention of such trade wars among the states is precisely the reason discriminatory taxation is strictly prohibited by the Commerce Clause.

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[35] *See* Ark. Stat. Ann. §§ 48-402, 48-636, 48-711 (1977 & Supp. 1983); Fla. Stat. Ann. §§ 564.06, 565.12, 565.14 (West Supp. 1983); Ga. Code Ann. §§ 3-6-50, 3-4-60 (1982 & Supp. 1983); Ill. Ann. Stat. ch. 43, § 158-1 (Smith-Hurd Supp. 1983-84); Iowa Code Ann. §§ 123.136, 123.146 (West Supp. 1983-84); Ky. Rev. Stat. Ann. § 243.720 (Michie Supp. 1982); Me. Rev. Stat. Ann. tit. 28, §§ 452, 501 (Supp. 1982-83); Md. Ann. Code art. 4, §§ 5, 133 (1981 & Supp. 1982); Mich. Stat. Ann. § 18.987(1) (Callaghan Supp. 1983-84); Minn. Stat. Ann. § 340.436 (West Supp. 1983); Miss. Code Ann. § 27-71-7 (Supp. 1982); N. J. Stat. Ann. § 54:43-1 (West Supp. 1983-84); N.M. Stat. Ann. § 60-6A-11 (1981); N.C. Gen. Stat. §§ 105-113.86, 105-113.95 (1979 & Supp. 1981); R. I. Gen. Laws § 3-10-1 (Supp. 1982); S. C. Code Ann. § 12-21-1040 (Law. Co-op 1982); S.D. Codified Laws Ann. § 35-5-3.1 (1977); Tenn. Code Ann. §§ 57-3-207, 57-3-302 (1980); Tex. Alco. Bev. Code Ann. § 203.08 (Vernon 1978); Va. Code § 4-25.1 (1983).

[36] *See* Conn. Gen. Stat. Ann. § 12-451 (West 1983); Del. Code Ann. tit. 4, § 728 (1975); Ind. Code Ann. § 7.1-2-7-3 (Burns 1978); Mich. Stat. Ann. § 18.1011 (Callaghan Supp. 1983-84); Ohio Rev. Code Ann. §§ 4301.54, 4301.55 (Page 1982); Or. Rev. Stat. § 473.040 (1981); Pa. Stat. Ann. tit. 47, § 105 (Purdon 1969); and R. I. Gen. Laws §§ 3-10-15, 3-10-17 (1976).

II. THE HAWAII LIQUOR TAX IS AN IMPOST OR DUTY PROHIBITED BY THE IMPORT-EXPORT CLAUSE.

In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), this Court overturned a century of precedent in ruling that the Import-Export Clause does not prohibit a state from imposing a *nondiscriminatory* property tax on imported goods in their original carton.[37] In an opinion by Mr. Justice Brennan, the Court identified three principal concerns of the Framers underlying their adoption of a constitutional restraint on state taxation of imports:

> (1) The Federal Governmental must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;
> (2) Import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
> (3) Harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

423 U.S. at 285-86 (footnotes omitted).

Applying this test, the Court upheld the application of Georgia's nondiscriminatory ad valorem property tax to Michelin's inventory of imported tires. It was "obvious" that such a tax could have "no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce" because it did not "fall on imports as such because of their place of

[37] *See generally* Walter Hellerstein, "Constitutional Limitations On State Tax Exportation," 1982 Am. B. Foundation Research J. 1, 6-8, from which the following discussion of *Michelin* draws.

origin." 423 U.S. at 286. As a general tax applicable to all property in the state, it could not have been used "to create special protective tariffs or particular preferences for certain domestic goods," and could not be "applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.* The Court likewise found that the imposition of a nondiscriminatory ad valorem property tax would not threaten the federal government's reliance upon imposts and duties as a source of revenue. Since a nondiscriminatory tax "cannot be selectively imposed and increased so as substantially to impair or prohibit importation," *id.* at 288, such a tax has at most an "incidental effect" on federal import revenues. *Id.* at 287. Finally, the Court found that the tax would not disturb the harmony among the states because the coastal jurisdictions would receive compensation only for services and protection extended to the imports by the local government. *Id.* at 289. *See Washington Revenue Department v. Washington Stevedoring Association*, 435 U.S. 734, 751-55 (1978).

In his analysis of the foreign policy and revenue issues, Mr. Justice Brennan made it clear that state taxation which falls on imports *must* be nondiscriminatory to pass muster under the Import-Export Clause. This is because such taxes create special protective tariffs which undermine the federal government's ability to speak "with one voice" and, by discouraging importation, decrease its revenues. To the point in this case, Mr. Justice Brennan's example of a prohibited discriminatory tax in footnote 7 of the *Michelin* opinion plainly embraces the tax here involved:

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. *Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost.* Nothing in the opinion of ***Brown v. Maryland*** should suggest otherwise. The Court in ***Brown*** merely pre-

> sumed that at these later stages of commercial activity, state impositions would not be discriminatory. But merely because *Brown* would have authorized a nondiscriminatory charge on even an importer's use of the services of a public auctioneer, see 12 Wheat, at 443, 6 L.Ed. 678, does not mean that it would have disapproved the holding of *Cook v. Pennsylvania*, 7 Otto 566, 24 L.Ed. 1015 (1878), which invalidated a tax on the sale of goods by auction that discriminated against foreign goods.

Michelin Tire Corp. v. Wages, 423 U.S. at 288 n. 7 (emphasis added).

That Hawaii's liquor tax creates a preferential trade area for locally produced liquors antithetical to the federal government's exclusive control of foreign commerce is obvious. In operation, it is no less destructive of the government's import revenues. The rate of the tax has been repeatedly increased over the years to its present 20%.[38] This rate, plus the "pyramid" effect of the tax (particularly its assessment on top of federal customs duties), acts as a substantial deterrent to the importation of foreign liquors. For example, utilizing the data provided in the Stipulation of Facts, a case of French wine priced at $10 per bottle (F.O.B. the winery) would cost $387.60 by the time it reached the consumer in Hawaii. Fully $78 of this sum is liquor tax.[39] The cost of a case of Hawaii wine with an F.O.B. price of $10 per bottle would be $229.20, with no tax component. The difference in cost between the two cases of wine is $158.40,[40] nearly one-half of which is tax.[41] This price differential reduces the demand for foreign wines which, in turn, decreases the

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[38] *See supra* notes 7-11 and accompanying text.

[39] *See supra* notes 31-32 and accompanying text. The higher cost of the French wine is attributable to the greater distances involved in transporting the wine to Hawaii, federal customs brokerage fees, and the additional liquor tax assessed on each of these costs. Statement of Facts ¶¶ 13, 17-19. (J.A. 21-23).

[40] $387.60 (French wine)—$229.20 (Hawaii wine) = $158.40.

[41] $78.00 (tax applicable to French wine) ÷ 158.40 (cost difference) = 49%.

volume of imports and the federal government's import revenues.

Hawaii's liquor tax is also distinguished from the taxes imposed in *Michelin* and *Washington Revenue* by its rate. In *Michelin*, the personal property tax rate was only 1.2%; *Washington Revenue* involved a 1% business and occupation tax on stevedoring services. The tax challenged here is 20% of the wholesale value of the liquor sold. In view of this high rate, Hawaii's liquor tax has more than an "incidental" effect on the volume of foreign liquors imported into Hawaii. *See Michelin Tire Corp. v. Wages*, 423 U.S. at 286-88.

It is clear, then, that the Hawaii liquor tax does not satisfy the first two criteria of the *Michelin* test.[42] It is, therefore, invalid as an impost or duty prohibited by the Import-Export Clause.

III. THE HAWAII LIQUOR TAX VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

By limiting its tax exemptions to locally produced liquor, Hawaii fails to treat out-of-state manufacturers and the Hawaii wholesalers who represent their products in the same manner as it treats such businesses operating entirely in Hawaii. Once a state allows foreign corporations to do business within their borders, "the adopted corporations are entitled to equal protection with the state's own corporate progeny." *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949). In *Wheeling*, this Court declared unconstitutional a provision of Ohio's ad valorem property tax which subjected certain intangible property of non-Ohio corporations to a tax not applied to identical property of Ohio corporations. This Court concluded that the provision violated the Equal Protection Clause since the inequality of treatment was "not because of the slightest difference in Ohio's relation to the decisive transaction, but solely

[42] Since the tax does not apply to liquor whose ultimate sale or use is outside Hawaii, the third criteria in *Michelin* is not applicable.

because of the different residence of the owner." 337 U.S. at 572.[43] In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), this Court sustained a provision of Ohio's ad valorem property tax which exempted property held in storage warehouses by non-resident corporations, but did not exempt identical property of Ohio corporations.

In his concurring opinion in *Allied Stores*, Mr. Justice Brennan explained that the critical distinction between the Court's rulings in *Allied Stores* and *Wheeling* is rooted in our federal system:

> *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the other state members of our federation.

358 U.S. at 533. In contrast, the tax at issue in *Allied Stores* discriminated in favor of non-residents and against the state's own residents. Such taxes do not disrupt the federal system. *Id.* The practical effect of the tax was to encourage interstate commerce. The discrimination thus did not invoke the protection of the Equal Protection Clause. In such cases, it is the choice of the particular state's legislature to balance the benefits gained in encouraging foreign corporations to do business in the state against the cost of taxing its own resident corporations.

But where the tax discriminates against non-residents in favor of residents of the taxing state, as in *Wheeling*, the practical effect of the tax is to discourage interstate commerce and to disrupt the federal system. 358 U.S. at 533. The Equal Protection Clause must then be applied as an "instrument of federalism" to eradicate the discrimination. *Id.* at 532.

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[43] *See also WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119-20 (1968); *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 545-47 (1934); *Hanover Fire Insurance Co. v. Carr*, 272 U.S. 494, 507-08 (1926); *Southern Railway Co. v. Greene*, 216 U.S. 400, 412, 417-18 (1910).

While Mr. Justice Brennan's view has not been adopted by a majority of this Court, *Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 645, 667 n.21 (1981), the problems raised by the tax classification at issue here demonstrate the need to apply the principles of federalism embraced by the Clause. The tax was not enacted to further any valid state interests such as public health or safety. The sole purpose of the Hawaii tax is to favor the economic interests of resident liquor manufacturers and wholesalers who sell such liquor. Such simple economic protectionism must not be condoned as a legitimate state purpose under the Equal Protection Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). But rather, the Clause must be applied "to give effect to its role to protect our federalism" by denying Hawaii "the power constitutionally to discriminate in favor of its own residents against the residents of other members of our federation." *Allied Stores of Ohio v. Bowers*, 358 U.S. at 533 (Brennan, J. concurring).

CONCLUSION

For the reasons stated above, McKesson respectfully requests that the consolidated judgment of the Hawaii Supreme Court sustaining the validity of the Hawaii liquor tax be reversed, and the tax invalidated in its entirety. Accordingly, the taxes presently held in escrow should be returned or a credit applied against future tax liabilities in accordance with statutory requirements. Finally, the state should be enjoined against any future collection of the tax.

September 1, 1983

Respectfully submitted,

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APPENDIX

APPENDIX A

S. Stand. Comm. Rep. No. 87, 1st Hawaii State Leg., Budget Sess. (1960), *reprinted in* 1960 Hawaii Senate Journal 224.

The purpose of this bill is to exempt the firm of Ti Root Okolehao Hawaii, Inc. from the 16% alcohol tax in Section 124-4 of the Revised Laws of Hawaii 1955. The object of the bill is to encourage and promote the establishment of a new industry.

Your Committee on Ways and Means is in accord with the intent and purpose of Senate Bill No. 88 and recommends that it pass second reading and be re-referred to the Committee on Ways and Means.

Signed by all members of the Committee. Senator Yoshinaga did not concur.

APPENDIX B

S. Stand. Comm. Rep. No. 222, 1st Hawaii State Leg., Budget Sess. (1960), *reprinted in* 1960 Hawaii Senate Journal 256.

The purpose of this bill is to encourage and promote the establishment of the ti root okolehao industry.

Your Committee did not think it proper to give an exemption to one particular firm, and accordingly made the exemption applicable to all who are similarly situated.

The title was amended to read as follows:

"AN ACT TO AMEND SECTION 124-4, REVISED LAWS OF HAWAII 1955, AS AMENDED, TO EXEMPT TI ROOT OKOLEHAO DISTILLED IN THE STATE OF HAWAII, FROM THE 16% ALCOHOL TAX."

Section 1 was amended by deleting the phrase ". . . Ti Root Okolehao Hawaii Inc." and inserting in lieu thereof the phrase ". . . ti root okolehao distilled in the State of Hawaii."

Your Committee on Ways and Means is in accord with the intent and purpose of this bill and does therefore recommend that Senate Bill No. 88, as amended in S. D. 1. pass Third Reading.

Signed by all members of the Committee excepting Senators Yoshinaga and Ariyoshi.

APPENDIX C

H. Stand. Comm. Rep. No. 322, 1st Hawaii State Leg., Budget Sess. (1960), *reprinted in* 1960 Hawaii House Journal 373.

The purpose of this bill is to grant liquor tax exemption on the wholesale price of the liquor sold by the distillers of ti root okolehao in the State of Hawaii for a period of 5 years.

Your Committee is in accord with the intent and purpose of this bill and recommends its passage.

Signed by all members of the Committee. Representatives Kamaka, Kato, Kennedy and Milligan did not concur.

APPENDIX D

H. Stand. Comm. Rep. No. 246, 6th Hawaii State Leg., Reg. Sess. (1971), *reprinted in* 1971 Hawaii House Journal 793-94.

The purpose of this bill is to exempt okolehao manufactured in Hawaii from the state liquor tax law for a period of five years.

Section 244-4 imposes a twenty percent excise tax upon the wholesale price of liquor in respect of the transaction by which the seller, user or his vendor acquired the same. Exceptions thereto are enumerated, including, inter alia, liquor held for sale by a permittee but not yet sold or sold between permittees, liquor sold or used for sacramental or prescription purposes, or liquor neither delivered or to be used in the state or which is otherwise constitutionally exempt.

Enactment of this bill would add to the list of exemptions, okolehao manufactured in Hawaii for a period of five years. The department of taxation is opposed to any type of exemption without "strong justification." Your Committee has considered the arguments advanced in favor of the exemption and finds them sufficiently strong.

Testimonies were received that over the past decade well over a million dollars has been lost attempting to create a significant market for ti root okolehao, fabled in song and legend as Hawaii's own spirit product. Once before, in fact, the industry similarly requested, and the legislature granted, a five year period of exemption which has since expired.

According to the Distilled Spirits Institute, Hawaii now realizes over $9 million from the twenty percent tax annually. However, according to the state department of taxation, since expiration of the previous exemption several years ago, only a very small share (less than 1.0%) of this sum is attributable to sales of various liquors manufactured locally (only a part of which is okolehao, for which the exemption is sought).

It is hoped by industry that the taxes temporarily saved by this relatively new and expanding business may be channeled into national promotion and competitive pricing, the result of which is a linking of okolehao to Hawaii as tequila is to Mexico. Even with the anticipated expanded sales, it is expected that the total annual tax otherwise due on okolehao sales would amount to less than $15,000 per year. Relief is not sought from the general excise tax.

Considering the jobs this industry creates and the prospects presented by proper promotion of its product, your Committee believes that the tax revenue loss is nominal only compared with the benefit, particularly when reviewed in light of the thousands of dollars appropriated annually by the state in matching funds to promote other products grown and manufactured in Hawaii. Thus, the benefit to this industry (and the state) is by parity if not in kind.

Your Committee respectfully recommends the changes which it has effected to the amendment: (1) correct spelling of the word "okolehao," (2) substitute the word "manufacture" for the word "made," and delete the words "of Hawaii" following the word "State."

Your Committee on Finance is in accord with the intent and purpose of H. B. No. 588, as amended herein, and recommends that it pass second reading in the form attached hereto as H. B. No. 588, H. D. 1, and be placed on the calendar for third reading.

Signed by all members of the Committee.

APPENDIX E

S. Stand. Comm. Rep. No. 408-76, 8th Hawaii State Leg., Reg. Sess. (1976), *reprinted in* 1976 Hawaii Senate Journal 1056.

The purpose of this bill is to extend the exemption of okolehao manufactured in the State from the liquor tax for an additional five years, to June 30, 1981. It is hoped that this five-year extension will aid the local okolehao industry get on a firm financial foundation.

Your Committee has amended this bill to provide a similar five-year exemption to the local fruit wine industry. Testimony received indicates that there may be an economic potential to the State in this area which, hopefully, this bill can help stimulate.

Your Committee on Ways and Means is in accord with the intent and purpose of S.B. No. 2230-76, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 2230-76, S.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

APPENDIX F

H. Stand. Comm. Rep. No. 689-76, 8th Hawaii State Leg., Reg. Sess. (1976), *reprinted in* 1976 Hawaii House Journal 1590.

The purpose of this bill is to grant liquor tax exemption [sic] for five years to the local okolehao industry and local fruit wine industry.

The exemption to the okolehao industry is an extension of a present exemption for another five years. The exemption granted to the fruit wine industry is new. The intent is to stimulate these industries and help to place them on a firm financial foundation.

Your Committee on Finance is in accord with the intent and purpose of S.B. No. 2230-76, S.D. 1, and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committee except Representative Amaral.

APPENDIX G

H. Conf. Comm. Rep. No. 31, 11th Hawaii State Leg., Reg. Sess. (1981), *reprinted in* 1981 Hawaii House Journal 911-12.

The purpose of this bill is to exempt rum manufactured in the State from the liquor tax for five years and to delete the prohibition on labeling or selling rum as "Hawaii Rum" or "Hawaiian Rum" unless it has been aged for at least two years. The bill also provides that liquor may be labeled or sold using the word "Hawaii," "Hawaiian," or "Aloha State" as long as it is at least partially manufactured in the State.

Under present law, it is required that rum be aged for at least two years from the date of distillation if it is to be labeled or sold as "Hawaii Rum" or "Hawaiian Rum." Your Committee notes that the labeling prohibition has proved to be an effective bar to local distillers establishing a market for Hawaiian rum.

Your Committee feels that the labeling requirement bears no reasonable relationship to insuring the quality of the product and therefore agrees with the intent of the bill that there is no need for such an aging requirement prior to labeling.

Your Committee is aware of the consolidated cases in the State Tax Appeal Court, Civil Nos. 1852, 1862, 1866 and 1867, under the name *Bacchus Imports, Ltd., et al. v. Freitas,* currently pending in the State Supreme Court, regarding the validity of certain liquor tax exemptions, and has had extensive discussions with the Attorney General's Office and the State Tax Department regarding the cases. Your Committee also notes that opinions conflict as to whether or not the national tax structure provides an advantage to rum produced in Puerto Rico and therefore makes no finding on that issue. Your Committee does feel, however, that providing a tax incentive in the form of a liquor tax exemption for a period of years is an appropriate method of encouraging the development of a new industry in the State and is therefore in agreement with the intent of the bill.

Your Committee has made a technical correction to the bill.

Your Committee on Conference is in accord with the intent and purpose of H.B. No. 247, S.D. 2, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 247, S.D. 2, C.D. 1.

Representatives Blair, Andrews, Baker, Hirono and Liu,
Managers on the part of the House.

Senators Yamasaki, Abercrombie and Henderson,
Managers on the part of the Senate.

APPENDIX H

S. Conf. Comm. Rep. No. 29, 11th Hawaii State Leg., Reg. Sess. (1981), *reprinted in* 1981 Hawaii Senate Journal 917.

The purpose of this bill is to exempt rum manufactured in the State from the liquor tax for five years and to delete the prohibition on labeling or selling rum as "Hawaii Rum" or "Hawaiian Rum" unless it has been aged for at least two years. The bill also provides that liquor may be labeled or sold using the word "Hawaii," "Hawaiian," or "Aloha State" as long as it is at least partially manufactured in the State.

Under present law, it is required that rum be aged for at least two years from the date of distillation if it is to be labeled or sold as "Hawaii Rum" or "Hawaiian Rum." Your Committee notes that the labeling prohibition has proved to be an effective bar to local distillers establishing a market for Hawaiian rum.

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Your Committee has made a technical correction to the bill.

Your Committee on Conference is in accord with the intent and purpose of H.B. No. 247, S.D. 2, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 247, S.D. 2, C.D. 1.

Senators Yamasaki, Abercrombie and Henderson,
Managers on the part of the Senate

Representatives Blair, Andrews, Baker, Hirono and Liu,
Managers on the part of the House

No. 82-1565

In the Supreme Court of the United States

OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC., *Appellants*,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, *Appellee*.

**On Appeal from the Supreme Court
of the State of Hawaii**

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TABLE OF CONTENTS

Table of Authorities

Cases

Miscellaneous

In the Supreme Court of the United States

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On Appeal from the Supreme Court of the State of Hawaii

REPLY BRIEF FOR THE APPELLANTS

I. APPELLEE ABANDONS THE GROUNDS OF THE STATE COURT AND RAISES NEW ARGUMENTS THAT ARE NOT PROPERLY PRESERVED

Appellee's brief in this case is a confession and avoidance.

It is a confession because appellee abandons the grounds the Supreme Court of Hawaii used to sustain this statute. That court held the statute constitutional because "the promotion of domestic industry is a legitimate state purpose" (J. S. App. A-13), because appellants' freedom to sell untaxed Hawaiian okolehao, wine, and rum made discrimination against out-of-state products irrelevant (*id.* at A-25), and because the tax was "fairly apportioned" (*id.* at A-27 to A-30). Appellee all but concedes that the first of these is more damnation than defense, because protection of in-state products is condemned under the Commerce Clause by a rule of per se unconstitutionality. Appellee repudiates the second ground (Br. 30 n.21) and does not mention the third, implicitly conceding its irrelevance.

It is an avoidance because appellee fires a fusillade of arguments that have little to do with the merits. Appellee argues that the statute is only a little bit discriminatory, because Hawaii does not produce much okolehao or fruit wine, and small discriminations should be overlooked (Br. 28-30, 40-46). Appellee maintains that the wholesalers of wine are not entitled to refunds because they "passed on" the tax (Br. 10-14), that the tax exemptions are severable and thus the wholesalers cannot seek refunds (Br. 15-19), that any decision should not be applied to benefit these wholesalers (Br. 19-22), and that the size of the taxes wrongfully collected is so large that the state should not be required to repay (Br. 46-49). Appellee also introduces two new arguments on the merits: that the Twenty-first Amendment supports the tax (Br. 35-40) and that because a tax exemption is like a subsidy, a series of recent cases supports the discrimination (Br. 31-34).

These arguments were not made below, not passed on below, or both. Their status here is accordingly questionable. This Court has construed 28 U. S. C. § 1257, which supplies its jurisdiction in this case, as denying it the *power* to rule on grounds of decision that were not properly presented and preserved in the state court. E.g., *McGoldrick* v. *Compagnie General Transatlantique*, 309 U. S. 430, 433-35 (1940) (a constitutional argument invoked in support of a judgment, but not properly preserved in the state court, is outside this Court's jurisdiction); *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Webb* v. *Webb*, 451 U. S. 493 (1981). Although a party need not assert his arguments using any magic formula, see *Eddings* v. *Oklahoma*, 455 U. S. 104, 113-14 n. 9 (1981), he must at least assert the outlines and basic support of the argument. "The State as respondent may make any argument *presented below* that supports the judgment of the lower court", *Hankerson* v. *North Carolina*, 432 U. S. 233, 240 n.6 (1977) (emphasis added), but may not advance new grounds. We discuss below which of appellee's arguments were preserved.

II. THE PER SE RULE AGAINST PROTECTIONISM GOVERNS THIS CASE

States may not use the tax system to discriminate against products from out of state. The Commerce Clause implements this principle when the products come from other states; the Foreign Commerce and Import-Export Clauses implement it when the products come from abroad. Each clause establishes a per se rule that states may not favor their own products. E.g., *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318, 328-35 (1977); *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 288 & n.7 (1976); *Dep't of Revenue* v. *James B. Beam Distilling Co.,* 377 U.S. 341 (1964).

A. The Subsidy Cases do not Support Hawaii's Scheme

Appellee attempts to avoid this antidiscrimination principle by observing that states may subsidize local products and producers; appellee argues from this (Br. 31-34) that the tax exemption is equivalent to a subsidy and should be sustained. Although appellee did not raise this equivalence argument in the state court, we address it here out of concern that this Court may treat it as an elaboration of appellee's earlier arguments rather than a new argument.

Doubtless a state may subsidize local industry and local residents. The state raises taxes from its residents, and it need not spread the benefits indiscriminately among residents of other states who did not contribute to the fund that produced the benefits. E.g., *White* v. *Massachusetts Council of Construction Employers,* 459 U. S. ___ (No. 81-1003, Feb. 28, 1983); *Reeves, Inc.* v. *Stake,* 447 U. S. 429 (1980). It is also true that under some circumstances a tax exemption amounts to a subsidy. E.g., *Bob Jones University* v. *United States,* 461 U. S. ___ (No. 81-1, May 24, 1983); *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973). It does not follow, however, that whenever a state may support local residents through a subsidy it may do so through a tax exemption.

White, Reeves, and similar cases are based on a distinction between the state as participant in a market and the state as regulator of a market. As participant, the state may direct benefits toward residents. Were it otherwise, the federal nature of society would be destroyed: a state could not offer free education (or any other benefit) to its own residents without subsidizing residents of other states too. The rationale establishing that a state must be allowed to use its revenues in favor of its residents does not carry over to the state's role as regulator or tax collector. *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794, 809-10 & n.20 (1976). Requiring evenhanded taxation does not disable the state from serving as a government to its people. An unbroken line of cases establishes that Hawaii cannot levy taxes on foreign products unless it levies equal taxes on domestic products.[1]

B. There is no De Minimis Exception to the Antidiscrimination Principle

Appellee's principal argument on the merits (Br. 28-30, 40-46) is that a state may discriminate in favor of local business, so long as it does not discriminate very much. At first glance the discrimination here appears to be quite large: the difference between a tax of 20% on wine from California and no tax on wine from Hawaii easily can be $56.40 per case (McKesson Br. 25-27, showing derivation from stipulation of facts). The refunds sought by the appellants exceed $10 million (JA 7, 13). There can be no doubt that wine and brandy from outside Hawaii labored under a substantial disadvantage compared with products made in Hawaii.

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[1] One important reason for the distinction between taxes and subsidies is that they often have a different economic incidence. A subsidy comes from revenues in the state's treasury, revenues that will inure to the benefit of the state's residents one way or the other. A discriminatory tax, on the other hand, often falls on residents of other states. The tax in this case reduced the volume of sales of wines and liquors from California and France, and it reduced the markups of the wholesalers who had to reduce their price to compensate for the tax. The economic incidence is hard to determine with precision (see the discussion *infra*), but it is certain that some of the cost is borne outside Hawaii. Preventing the exportation of taxes is one of the principal purposes of the Commerce Clause.

Appellee asks the Court to look from a different perspective. Okolehao and pineapple wine are not made outside Hawaii. They were not sold in large volumes; according to appellee (Br. App. A-1) they represented less than one percent of all liquor sold in Hawaii. Consequently, appellee maintains, the preference for Hawaii products could not do "very much" damage to products from out of state, and the discrimination should be excused.[2]

Perhaps there would be substance to appellee's argument if the state had levied a tax on alcohol and exempted alcohol in after-shave lotion made in Hawaii. Then the alcoholic beverages sold by appellants really would not compete with the products of Hawaii. But the state's tax applies to "liquor," which the statute defines to include okolehao, wine, and all other alcoholic beverages (Haw. Rev. Stat. § 281-1, quoted at n.1 of our opening brief). The State has established the category within which competition occurs.

There is little doubt that okolehao and fruit wine compete with the non-Hawaii beverages appellants sell. Okolehao is a brandy, which competes with other specialty drinks such as cognac and Benedictine (a flavored brandy). The legislative history of the tax exemption indicates that Hawaii was attempting to boost Hawaiian okolehao to the same sort of market position now occupied by Mexican tequila. Haw. Stand. Comm. Rep. No. 246, 6th Legis. (1971) (see McKesson Br. App. A-3). Pineapple wine has no distinctive pineapple taste; it competes with wines made from other fruits (apples and pears as well as grapes). Wines of all sorts compete; a sweet sauterne does not taste like a dry fume blanc, but the two nonetheless are in the same market. When the state legislature enacted the tax

[2] Appellee also contends that the lack of substantial effect on foreign goods shows that the statute is a beneficent preference for a struggling local industry rather than a malign effort to "get" foreign producers (Br. 8, 40-42). The Court need not impugn Hawaii's motives to recognize that creating a preference for local industry and imposing a detriment on industry elsewhere are two sides of the same coin. There cannot be a preference without a detriment. It is therefore pointless to debate whether Hawaii's motives were or were not pure. The per se rule against discrimination applies whichever characterization of the motive is most appropriate.

preference, it anticipated the development of a grape wine business as well as a pineapple wine business (which is why the exemption covers "fruit wine"). Although the difficulty of raising in Hawaii grapes suitable for wine delayed the production of that beverage, grape wine is now made there.[3]

It may be true, as appellee emphasizes, that despite the 20% price advantage created by the discriminatory tax, okolehao and pineapple wine have not prospered in competition with liqueurs and wines from California or France. By appellee's reasoning, Hawaii is entitled to make the tax difference higher and higher until, at some point (perhaps a 50% price difference), Hawaiian products claim a significant part of the market. There must come a point at which they will do so. Then the state may maintain the tax difference at that level (or perhaps a few percent less) indefinitely, so long as the home-grown product does not claim "too high" a percentage of the sales.

It does not take extended argument to show that a state may not justify such a preference on the ground that it is "not too big," or that it is "reasonable," or appropriate under some other formula. The constitutional command is that the nation be a single free-trade zone. States may not prefer local goods just because they will not sell in the absence of protectionism. There is no "acceptable" level of Balkanization via discriminatory taxes. The only constitutionally-acceptable level of tax discrimination is zero.[4]

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[3] Similarly, rum distilled in Hawaii, the subject of an exemption enacted in 1981, competes with rum distilled elsewhere. A great deal of rum is imported into Hawaii, and the domestic Hawaiian industry has burgeoned under its tax shelter.

[4] This Court's cases do not hint at an exception for small differences in the treatment of out-of-state products. E.g., *Maryland* v. *Louisiana*, 451 U. S. 725, 759-60 (1981); *Boston Stock Exchange, supra*, 429 U. S. at 334 & n. 13 (discrimination is impermissible even if small); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389 (1952) (difference between tax of $8 on in-state business and $50 on out-of-state business is unconstitutional); *Best & Co.* v. *Maxwell*, 311 U. S. 454 (1940) (tax of $250 on out-of-state merchants is unconstitutional even though some in-state merchants pay the same tax); *Walling* v. *Michigan*, 116 U. S. 446 (1886) (tax of $300 per agent on merchants that import liquor from out of state is unconstitutional, even

Footnote continued on following page.

III. THE TWENTY-FIRST AMENDMENT DOES NOT REQUIRE THAT THE COMMERCE CLAUSE BE REINTERPRETED TO COUNTENANCE DISCRIMINATION AGAINST PRODUCTS FROM OUT OF STATE

Appellee argues (Br. 30-35) that discriminatory taxation of alcoholic beverages may be sustained under the Twenty-first Amendment even if it would be a violation of the Constitution with respect to other products. This argument was not presented to the Supreme Court of Hawaii, and that court did not mention the Twenty-first Amendment. Indeed, appellee's brief in the court below expressly declined to rely on the Twenty-first Amendment. Accordingly, if the Twenty-first Amendment is invoked as a new ground in support of the judgment below, it is outside the jurisdiction of this Court. See page 2, *supra.*

Perhaps, however, appellee invokes the Twenty-first Amendment only for assistance in the interpretation of the other portions of the Constitution on which we rely. This Court's decisions suggest that the Twenty-first Amendment plays a role in the construction of these other provisions even when it does not override them. E.g., *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 106-14 (1980); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 332 (1964). Issues concerning the proper application of the Commerce, Foreign Commerce, and Import-Export Clauses to the taxation of liquor were presented below and consequently are within this Court's jurisdiction even though appellee did not present in the state courts all of the arguments he offers in this Court. As a matter of prudence, therefore, we address the Twenty-first Amendment issues raised by appellee.

Footnote continued from preceding page.

though merchants that sell domestic liquor are taxed $500, because some merchants have multiple agents); *Guy* v. *Baltimore*, 100 U. S. 434 (1879) (wharfage fee of $4.40 on a cargo of potatoes from another state is unconstitutional because no identical fee is levied if cargo is from within the state).

To understand the bearing of the Twenty-first Amendment on the Commerce Clause argument, one must start with the purposes served by this Court's decisions prohibiting discriminatory taxation. The Court has held repeatedly that the Commerce Clause preserves a zone of free trade and protects the Nation from Balkanization. E.g., *Boston Stock Exchange, supra,* 429 U. S. at 328-29; *Welton* v. *Missouri,* 91 U. S. 275, 278-81 (1875). When Congress has used its Commerce Power to regulate part of a field but not the rest, the Court infers that Congress meant that the rest of the field be left open to free trade. When Congress has left the field entirely free of regulation, the Court draws the same inference. Congress may authorize states to go their separate ways, but to do this Congress must speak clearly.[5] Because the principal purpose of the Commerce Clause was to grant powers to Congress, the whole "dormant Commerce Clause" jurisprudence rests on a series of inferences about the meaning of Congressional action and inaction. No matter what, the decisions of Congress govern.

The Twenty-first Amendment grants states regulatory powers over commerce that they lacked while the "original package doctrine" of *Low* v. *Austin,* 13 Wall. (80 U. S.) 29 (1872), reigned. *Low* held that so long as goods from out of state remained in their original packages, states could not regulate or tax them. This made it difficult or impossible for states to close their borders to liquor, because importers could deliver liquor in the original package direct to the consumer. The Twenty-first Amendment ensured that, no matter what interpretation this Court might place on the Commerce Clause in the future, states could freely choose to be "dry" and could regulate liquor arriving from out of state in the same way they

[5] The court below relied (J. S. App. A-13) on one of the cases of express authorization, *Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 451 U. S. 648 (1981), for the proposition that it is legitimate for a state to favor domestic products. This Court held no such thing. It said, rather, that "promotion of domestic industry *by deterring barriers to interstate business* is a legitimate state purpose" (*id.* at 671, emphasis added).

regulated other liquor. Our opening Br. 29-40 and the Wine Institute Br. 11-26 discuss the legislative history of the Twenty-first Amendment in detail.

Yet the Twenty-first Amendment does not withdraw any powers of Congress under the Commerce Clause. Indeed, the history of the Twenty-first Amendment strongly suggests that it was designed to confirm the constitutionality of two statutes, the Wilson Act of 1890, 27 U. S. C. § 121, and the Webb-Kenyon Act of 1913, 27 U. S. C. § 122, that had *exercised* the Commerce Power by allowing states to close their borders to liquor. See ***Clark Distilling Co.*** v. ***Western Maryland Ry.***, 242 U. S. 311 (1917) (sustaining the Webb-Kenyon Act); ***Scott*** v. ***Donald,*** 165 U. S. 58 (1897) (sustaining the Wilson Act). Immediately after the effective date of the Twenty-first Amendment, in reliance on the Commerce Power, Congress enacted the Federal Alcohol Administration Act, 27 U. S. C. §§ 201-12, which contains a battery of liquor control devices. These include licensing and labeling requirements, taxes, and rules for the conduct of business. Since that time the Court has applied these statutes without constitutional scruple (e.g., ***Rice*** v. ***Norman Williams Co.***, 458 U. S. 654 (1982)), has sustained them when attacked under the Twenty-first Amendment (e.g., ***Idlewild Bon Voyage Liquor, supra***), and has sustained other statutes enacted before the Twenty-first Amendment (e.g., ***Midcal, supra,*** holding that the Sherman Act preempts a state liquor-control statute).

So long as Congress remains free to exercise its Commerce Power to prevent Balkanization, it is also appropriate for this Court to continue to infer that Congressional silence means that states may not discriminate. It is true that a few cases stated that the Twenty-first Amendment allows states to discriminate against products from outside their borders. E.g., ***State Board of Equalization*** v. ***Young's Market Co.***, 299 U. S. 59 (1936) (disparate license fees); ***Mahoney*** v. ***Joseph Triner Corp.***, 304 U. S. 401 (1938). But these cases did not consider the genesis of the rule against discriminatory taxation or discuss the relation between federal and state power. They did not discuss the history of the Twenty-first Amendment either, deeming the

language too "clear" to permit inquiry into purposes and functions. Later cases that have discussed these dispositive issues have uniformly held that state authority under the Twenty-first Amendment does not displace federal authority. E.g., *Midcal, supra; Idlewild Bon Voyage, supra; James B. Beam, supra; United States* v. *State Tax Comm'n*, 412 U. S. 599 (1975) (federal enclaves); *Craig* v. *Boren*, 429 U. S. 190 (1976) (Fourteenth Amendment).[6]

This argument is sufficient to establish that unexercised federal power would be enough to prevent states from enacting protectionist legislation, at least when the state does not invoke an interest in temperance or in raising revenue. The statute challenged here does neither: the tax exemption for local products does not raise revenue, and because the exemption reduces the price of local products, it does not promote temperance either. Neither the language nor the history of the Twenty-first Amendment indicates that it recognizes any interest in provincialism or authorizes the states to favor domestic products. When the interests served by the Twenty-first Amendment are inapplicable, the state's power lapses and the ordinary principles of free trade prevail. *Midcal, supra*, 445 U. S. at 112-14.

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[6] Cases such as *Young's* not only omit consideration of Congressional power but also rest on a form of argument that has long since been discarded. The cases start from the premise that the Twenty-first Amendment grants power to states and then reason that the greater power to exclude liquor necessarily includes the lesser power to tax or discriminate. This greater-includes-the-lesser argument led the Court to say in *Young's* that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." 299 U. S. at 64. The problem with this line of argument is that it proves far too much. Greater-includes-the-lesser arguments imply that a state with the power to go dry also could limit liquor licenses to whites (or to people who vow to refrain from criticizing the government), could have different drinking ages for men and women, could tax U. S. and Scotch liquor at different rates, could authorize resale price maintenance or other violations of the antitrust laws, and on and on and on. This Court has rejected each of these implications, in cases such as *Craig* v. *Boren*, *James B. Beam*, and *Midcal*. These more recent cases so thoroughly undercut the rationale of *Young's* and similar cases that it may be most appropriate for the Court to acknowledge that the earlier cases are no longer to be followed.

More importantly, federal power is not unexercised. The Wilson Act expressly precludes states from discriminating. The Wilson Act, enacted in 1890 and still in force (see *Idlewild Bon Voyage, supra,* 377 U. S. at 333 n. 11; *James B. Beam, supra,* 377 U. S. at 345 n. 7), provides that a state may regulate alcoholic beverages "to the same extent and in the same manner as though such liquids or liquors had been produced in such State" (27 U. S. C. § 121). This Court held in *Scott* v. *Donald, supra,* 165 U. S. at 100, that "the State cannot, under the [Wilson Act] ..., establish a system which, in effect, discriminates between interstate and domestic commerce in commodities ... which are admitted to be lawful." If the Wilson Act is a constitutional exercise of Congress's power, then the Hawaii system of discriminatory taxes cannot stand. Appellee does not challenge the constitutionality of the Wilson Act, and the state's argument therefore fails.

IV. THE WHOLESALERS ARE ENTITLED TO REFUNDS OF THE DISCRIMINATORY TAXES WHETHER OR NOT THEY PASSED THE TAXES ON

Although we have completed our discussion of the merits, appellee's brief is addressed principally to collateral issues. Using a variety of arguments, appellee maintains that even if Hawaii's system of taxation is unconstitutional the appellants are not entitled to relief. We take these arguments up in order, starting with the contention (Br. 5, 10-14) that wholesalers of liquor are not entitled to refunds because they "passed on" the taxes wrongfully exacted from them.

As we developed in our Brief in Opposition to Appellee's Motion to Dismiss or Remand (which this Court denied on December 12), the passing-on argument was not raised below and therefore is not within this Court's jurisdiction. See also page 2, *supra.*

There is no colorable argument that the appellants lack standing, so that Article III of the Constitution precludes this Court from addressing the merits. This is a suit for recovery of taxes paid. There is a concrete case or controversy. Appellants

stand to recover more than $10 million in taxes paid.[7] A plaintiff has standing even though he ultimately may not get what he seeks, perhaps because of a decision to equalize tax burdens by increasing the taxes of others. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 525-26 (1959). The appellants thus have standing.

The "passing-on" defense now asserted by appellee must be one arising under state law rather than Article III. Appellee apparently maintains that the consumers or retailers, rather than the wholesalers, are the appropriate persons to recover the tax. (All of the refund cases cited by appellee at Br. 11-12 n. 14 are based on state law.) Such state defenses must be raised in the state courts, if they are to be raised at all. The defense was not raised; the Hawaii court did not mention it as a possibility; this Court therefore must proceed on the assumption that, as a matter of state law, the wholesalers are the appropriate parties to recover the taxes they actually paid.[8] *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 785 n. 17 (1980).

We also question whether, as a matter of federal law, a state *could* refuse to refund taxes paid by wholesalers in the circumstances of this case. See *Ward* v. *Love County*, 253 U. S. 17 (1920) (a state that collects taxes in violation of federal right must refund them, despite lack of state authority to refund). Many of this Court's cases applying the antidiscrimination principle of taxation are suits for refunds by middlemen (or, equivalently, efforts by middlemen to avoid punishment for refusal to pay taxes). From the very first case in this sequence,

[7] The claim for damages prevents the case from being moot, even though the exemptions challenged have expired. *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369, 372 n. 2 (1974). Moreover, Hawaiian rum is exempted from current taxes, so that the propriety of favoritism of domestic products continues to be a live dispute among the parties.

[8] One reason why appellee neglected to raise the defense below may be that it has no apparent foundation in state law. This suit is based on two explicit refund statutes, each of which vests the person paying the tax with the right to a refund. Hawaii Rev. Stat. §§ 40-35, 244-8 (quoted in Br. in Opp. to Motion to Dismiss or Remand 4 n. 2). The Hawaii courts have not adopted the approach to refunds taken by the cases collected in n. 14 of appellee's brief.

this Court has held that the Commerce Clause creates a federal immunity insulating the middleman from the state's demand for payment. The definition of the federal right is that the merchant need pay no more tax on goods brought in from out of state than it pays on other goods. If the domestic tax is zero, so too is the tax on imported goods.[9] A state cannot override this federal immunity by its mere say-so.

The Court's decision to cast the federal right as an immunity from taxation at any level exceeding the tax on in-state goods reflects the difficulties in proving the economic incidence of any overcharge. The Tax Injunction Act, 28 U. S. C. § 1341, requires persons such as the appellants to litigate in state court their objections to state taxes. State laws, including Hawaii's, commonly require payment of the disputed taxes as a condition of litigation. As a result, the state will hold all taxes in question for the duration of the litigation. If a state can refuse to repay the taxes, even once the basis for their collection has been deemed unconstitutional, the state will not only keep the fruits of its improper action but also seriously discourage future litigation against its statutes. Even if the taxpayer shows that it bore much of the economic incidence of the tax, it will be unable to recover all of the overpayment.

Considerations of this sort led the Court to conclude that the direct payor of an overcharge in violation of the antitrust laws could recover the entire sum, trebled. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1969). This is appropriate in part because an antitrust violation (like the

[9] E.g., *James B. Beam, supra*, 377 U. S. at 343 (a refund suit by an importer of Scotch whisky; held that the Constitution creates a right to the refund); *Memphis Steam Laundry, supra*, 342 U. S. at 391 (Commerce Clause requires refund of taxes paid by a merchant); *Best* v. *Maxwell, supra* (same); *I.M. Darnell & Son Co.* v. *City of Memphis*, 208 U. S. 113 (1908) (Commerce Clause requires refund of taxes, paid under protest into registry of court, by a lumber mill that purchases logs from out of state); *Tiernan* v. *Rinker*, 102 U. S. 123, 127 (1880) ("A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture"—this is the language of federal immunity from tax); *Guy* v. *Baltimore, suppa* (master of vessel cannot be prosecuted for failure to pay tax on goods brought in from another state); *Welton* v. *Missouri, supra* (peddler cannot be prosecuted for failure to pay tax on goods from out of state).

discriminatory tax) "takes from the [victim] more than the law allows" (392 U. S. at 489), and in part because in a complex economy it is almost inevitable that the direct payor of an overcharge (or tax) will bear some of the economic incidence of payment and pass the rest forward or backward. See also *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 731-33, 741-43 (1977) (discussing the economics of incidence analysis); McLure, *Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term,* 1 Sup. Ct. Economic Rev. 69, 72-84 (1982) (same).

The economic incidence of a tax of the kind challenged here is very hard to determine. The 20% levy will lead Hawaiians to purchase less liquor from out of state; this reduction in demand will reduce the price out-of-state producers realize for their goods. See *Burke* v. *Ford,* 389 U. S. 320 (1967). Thus some of the incidence falls on producers. The levy also will lead wholesalers to reduce their markups, so as to maintain their sales, and to sell less; part of the incidence falls on the wholesalers. JA 16-17, 23 (showing how tax increases wholesalers' costs). The rest of the cost falls on retailers and customers. How much falls on whom depends on the elasticities of supply and demand.[10] *Illinois Brick, supra.* It is hard to

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[10] Appellee says (Br. 10-11) that the incidence falls on the retailers, because the wholesalers may elect to "separately state" the tax and require the retailers to pay. This Court has recognized, however, that economics, not nomenclature, determines who pays a tax. E.g., *Washington* v. *United States,* 460 U. S. ____ (No. 81-969, Mar. 29, 1983) ("it makes no difference to the contractor (or to the purchasers) which of them is required to pay the tax to the State, as long as they have the opportunity to allocate the burden among themselves by adjusting the price."). At all events, appellee's representation (Br. 11) that appellants *did* separately state the tax is not supported by the record (and, if we are to go outside the record, is not true). The record consists of the stipulations, which do not mention separate statement of tax. Separate statement gives the wholesaler an additional remedy (albeit one within the discretion of state officials) to collect only the fraction of the invoice price that represents taxes. It leaves the wholesaler liable for the full tax if the retailer does not pay on time. (The record shows that retailers often do not pay on time, see JA 15-16, 22.) The wholesaler must resort to ordinary commercial means to collect the rest of the bill. Thus wholesalers do not use the separate statement mechanism. They submit a single bill that includes all elements of the price.

find elasticities, and so it is hard to answer the incidence question. It is far better for the Court to hold, as a matter of federal law, that the person who pays a discriminatory tax may recover the whole tax. Any other approach reduces taxpayers' incentive to enforce the Constitution and increases states' incentive to levy improper taxes.

V. THIS COURT MAY NOT CURE THE CONSTITUTIONAL FLAW OF HAWAII'S TAX BY SEVERING THE EXEMPTIONS FOR LOCAL PRODUCTS

The state invites this Court to cure the unconstitutional discrimination by severing the exemptions for okolehao and fruit wine (and, one supposes, the new exemption for rum) in order to save the 20% tax (Br. 15-19). With the exemptions eliminated, appellee reasons, the constitutional infirmity of unequal treatment will be gone. There are two reasons, however, why the severability argument does not assist appellee.

First, severance is a method of construing a statute. A state statute is severable or not as a matter of state law. This Court cannot construe a state statute into oblivion in order to save it. Only the state court may modify its law so as to bring about the equal treatment the Constitution demands. *Stanton* v. *Stanton*, 421 U. S. 7, 17-18 (1975).

Second, even if this Court could sever the exemption for okolehao and fruit wine, it is too late for that remedy to be of any use. True, the wholesalers' federal right is to equal taxation. Elimination of the exemption thus would have been a perfect response to appellants' complaint—*if done in time to permit equal taxation*. But it was not. The okolehao and fruit wine exemptions expired in 1981. The injury of discriminatory taxation has taken place. The wrong is complete. The exemptions are defunct. There is nothing left to sever or save.

Even if Hawaii were to offer to go out and collect a 20% tax from wholesalers of okolehao and fruit wine—which the state

has not offered to do, for good reasons[11]—that would not be a sufficient remedy for the constitutional wrong. As we stressed above, discriminatory taxes lead wholesalers of out-of-state goods to reduce their margins on each sale and to sell less. Thus they suffer economic loss. A state's offer to collect taxes on domestic products some years later leaves that injury without redress. The offer to sever the exemptions also has all of the difficulties of the "passing on" defense discussed above. It is part of an effort by the state to keep the benefits of its wrong and to discourage merchants from litigating to vindicate constitutional rights. A state should not be permitted to create "remedies," such as severance after the statute has expired, that drain the federal rights of force. Cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 232-34 (1969); *Davis* v. *Wechsler*, 263 U. S. 22, 24-25 (1923) (state grounds may not be used to defeat federal rights).

VI. THE INVALIDATION OF HAWAII'S STATUTE SHOULD BE APPLIED TO THE APPELLANTS IN THIS CASE

The last of appellee's procedural arguments is a contention (Br. 19-22, 46-49) that any decision against the constitutionality of the state's statute should not be applied "retroactively" to allow appellants to recover. The state maintains both that sudden changes in the law should be applied prospectively (Br. 19-22) and that the recoveries sought here are too large to permit such unexpected payouts (Br. 46-49). The argument was not presented below and therefore is not properly before this Court. See page 2, *supra*. It is unavailing in any event.

[11] Any attempt by Hawaii to collect taxes on okolehao and fruit wine for the period 1974 to 1981 (the time covered by appellants' applications for refund) would run into a serious problem: because state law did not purport to levy any tax on these products, the wholesalers that sold them would have a good defense to payment. The defense may be based on state law (want of authority to levy the tax, or statute of limitations) or on constitutional inhibitions on retroactive taxation. Moreover, some of the wholesalers of these products doubtless have gone out of business, so that collection would be impossible even if (which seems unlikely) the State possesses the records it would need to determine liability.

The state does not offer a standard "retroactivity" argument. A retroactivity problem may be presented by the *second* case that raises a problem; the Court must determine whether the rule laid down in case number one will be applied to other transactions that occurred before the date of the first decision. The answer to that question will turn on, among other things, the degree to which the first case upset settled expectations. But the *first* litigant prevails as of course. See *United States* v. *Johnson,* 457 U. S. 537 (1982) (surveying retroactivity doctrine). If the party that brought the first case were turned away without remedy, there would be little or no incentive to bring litigation. Here, for example, Hawaii would get to keep all of the proceeds of the discriminatory taxes. It has never been the function of retroactivity doctrine to insulate a state from *all* liability for wrongful levy of taxes.

On rare occasion the Court has refused to apply a rule in the very case announcing that rule. See *England* v. *Board of Medical Examiners,* 375 U. S. 411, 422-23 (1964). The justification advanced in such cases is that one party relied to its detriment on a line of authority and should not be penalized for this reliance, while at the same time nonretroactivity would not harm the other party. In *England,* for example, the refusal to apply a rule to the case simply permitted federal litigation of a federal right to proceed.

Hawaii cannot establish either reasonable reliance on settled doctrine or lack of prejudice to the appellants. It has been clear at least since 1875, when the Court decided *Welton,* that a state may not collect from a merchant a tax on out-of-state goods that exceeds the tax collected on domestic goods. It has been clear at least since 1897, then the Court decided *Scott* v. *Donald,* that the Wilson Act requires states to treat liquor from within and without the state equally. It has been clear at least since 1964, when the Court decided *Idlewild Bon Voyage Liquor* and *James B. Beam Distilling Co.,* that the Twenty-first Amendment does not give states absolute power over liquor or authorize discriminatory taxes of foreign liquors. Hawaii has been on notice since 1979 that the appellants deemed the state's discriminatory taxes to be unconstitutional under these cases.

From 1979 until it filed its brief in this Court, Hawaii has placed *no* reliance on the Twenty-first Amendment. It defended solely on the ground that protectionism is permissible state policy under ordinary Commerce Clause jurisprudence. This argument has been untenable for 109 years. Hawaii therefore cannot say that a decision in 1984 against the constitutionality of this tax would come as a shock. It has no legitimate reliance interests. Hawaii certainly cannot say that a failure in this case to recognize appellants' rights to freedom from discriminatory taxes would do no harm to appellants, which for years have been paying the taxes the state wrongfully demands of them.

These considerations also undercut the state's argument (Br. 46-49) that appellants should be sent away empty-handed because the state's refund liability is so large. A state that passes a discriminatory tax—in the teeth of cases holding that merchants need not pay the discriminatory levy—takes the risk that it will not get to keep the money. Hawaii took a large gamble. It cannot now seek shelter on the ground that it wagered more than it could afford to lose.[12]

Any "windfall" appellants will receive is attributable to the state's choices. Since 1979 the state has been on notice that the appellants considered the tax constitutionally defective. The state not only left the discrimination on the books but also enacted a new exemption, this time for rum. The legislature was warned that the exemption could well render the tax unconstitutional, but it enacted the exemption anyway. H. Conf. Rep. 13, 11th Sess. (1981), reproduced at McKesson Br. App. A-5. This new enactment strongly suggests that Hawaii has not been prejudiced by any lack of notice of constitutional

[12] The state's brief repeatedly states that the refund liability to appellants exceeds $100 million. The stipulations in this case establish, however, that the state's liability to these appellants for back taxes as of September 27, 1979, would be a little more than $10.8 million (JA 7, 13). These sums would be larger today, given interest and the accumulation of new taxes since 1979. But they would not come close to $100 million.

problems.[13] The state simply desires to assist its domestic liquor business, even if it has to violate the Constitution to do so. A state that has allowed the discrimination to persist long after being warned of its failing, and as a result has reaped very large revenues, has no equitable ground to avoid repayment. A state cannot properly say that, because it has waited too long and let the taxes mount up, the amount in question is now too large to be paid back, so the state must be allowed to keep the revenues for itself.

CONCLUSION

For these reasons, in addition to those stated in our opening brief, the judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted.

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December 23, 1983

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[13] The fact that since 1979 Hawaii has placed the disputed taxes in escrow, and not counted on the escrowed fund for state operations, further demonstrates lack of prejudice.

No. 82-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BACCHUS IMPORTS, LTD.,
and EAGLE DISTRIBUTORS, INC.,

Appellants,

v.

GEORGE FREITAS, Director of Taxation of the State of Hawaii,

Appellee.

On Appeal From The Supreme Court Of The State Of Hawaii

BRIEF *AMICUS CURIAE* OF DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

Do HAWAII REV. STAT. § 244-4 (6) and (7) (Supp. 1982), which impose a tax on all beverage alcohol sold in Hawaii except okolehao manufactured in the State and fruit wine manufactured in the State from products grown in the State, violate the United States Constitution in that they

(1) are a duty or impost on imports prohibited by the Import-Export Clause, art. I, § 10, cl. 2;

(2) are a burden on interstate commerce in violation of the Commerce Clause, art. I, § 8, cl. 3; and

(3) deny equal protection of the laws in violation of the Equal Protection Clause, amend. XIV, § 1?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

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On Appeal From The Supreme Court Of The State Of Hawaii

BRIEF *AMICUS CURIAE* OF DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

This brief is filed with the written consent of all parties pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States. *Amicus curiae*, the Distilled Spirits Council of the United States, Inc. ("DISCUS"), supports the position of appellants who urge the Court to reverse the decision of the Supreme Court of Hawaii upholding the Hawaii liquor tax, HAWAII REV. STAT. § 244-4 (Supp. 1982).

THE INTEREST OF DISCUS

Discriminatory State Beverage Alcohol Taxes Affect Members Of DISCUS

DISCUS is the principal national trade association of the distilled beverage alcohol industry. The members of DISCUS produce or import approximately 90% of the distilled beverage alcohol sold in the United States.

DISCUS estimates that its members supply approximately 70% of the distilled beverage alcohol sold in Hawaii. DISCUS has an interest in this appeal because those member and their products are discriminated against by HAWAII REV. STAT. § 244-4 (6) and (7) (Supp. 1982), which exempt Hawaiian okolehao and fruit wine from the tax imposed on all other beverage alcohol sold in the State.[1] However, the interest of DISCUS is not limited to those particular tax exemptions.

DISCUS is concerned also about the impact of this appeal on other discriminatory state beverage alcohol taxes. Hawaii has a discriminatory exemption for rum manufactured in the State, HAWAII REV. STAT. § 244-4 (8) (Supp. 1982), that did not become effective until after the period covered by this appeal. And Hawaii is only one of many states imposing this type of discriminatory tax.

Thirty-one States Impose Some Type Of Discriminatory Beverage Alcohol Tax

Taxes that either discriminate against beverage alcohol not produced in the state or retaliate against such tax discrimination by other states are in effect in 31 states. Those tax statutes are collected in an appendix of statutes filed with this brief.

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[1] The Hawaii liquor tax is imposed on all "liquor" sold in Hawaii except the tax-exempt products. HAWAII REV. STAT. § 281-1 (1976) defines "liquor" to include all beverage alcohol.

Nineteen states including Hawaii impose taxes that discriminate in favor of some or all wine produced in the state from products grown in the state.[2] One of those states also has a tax favoring table wine manufactured or bottled in the state regardless of where the ingredients are grown.[3] One other state treats a domestic winery as a wholesaler, thus exempting it from that state's tax on sales to wholesalers,[4] while another favors wine made from products grown in the state by imposing a higher mandatory retail mark-up on all other wine.[5]

All beer manufactured in the state is favored by one state tax[6] and another discriminates in favor of all "low-point" beer manufactured in the state.[7] Six states offer tax rebates on varying amounts of beer produced in the

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[2] ALA. CODE § 28-6-4 (b) (Supp. 1982); ARK. STAT. ANN. § 48-608 (1977); FLA. STAT. ANN. § 564.06 (2)-(5) (West Supp. 1983), as amended by Fla. Act of July 19, 1983, ch. 349, Section 14, Laws 1983, Senate Bill No. 3-XXX; GA. CODE ANN. § 3-6-50 (1), (3) (Supp. 1983); HAWAII REV. STAT. § 244-4 (7) (Supp. 1982); IND. CODE ANN. § 7.1-4-4-1 (Burns Supp. 1982); LIQ. CONT. L. SERV. (CCH) Kansas § 41-501 (b)(1), (g); ME. REV. STAT. ANN. tit. 28, § 501.4 (Supp. 1982-1983); MD. ANN. CODE art. 4, § 133 (g) (Supp. 1982); MICH. STAT. ANN. § 18.987 (1) (Callaghan Supp. 1983-1984); MINN. STAT. ANN. § 340.436 (West Supp. 1983); MISS. CODE ANN. § 27-71-7 (1) (Supp. 1982); N.J. STAT. ANN. § 54:43-1.e (West Supp. 1983-1984); N.M. STAT. ANN. § 60-6A-11 (1981); N.C. GEN. STAT. § 105-113.86 (o) (Supp. 1981), N.C. GEN. STAT. § 105-113.95 (1979); R.I. GEN. LAWS § 3-10-1 (Supp. 1982); S.C. CODE ANN. § 12-21-1040 (Law. Co-op. Supp. 1982); TENN. CODE ANN. § 57-3-207 (e) (1980); VA. CODE § 4-25.1.D (1983).

[3] ME. REV. STAT. ANN. tit. 28, § 452 (Supp. 1982-1983).

[4] WASH. REV. CODE ANN. § 66.24.170 (3) (Supp. 1983-1984), LIQ. CONT. L. SERV. (CCH) Washington § 66.24.210.

[5] N.H. REV. STAT. ANN. § 178-A:4 (Supp. 1981). New Hampshire is not counted among the 31 states with discriminatory taxes.

[6] ME. REV. STAT. ANN. tit. 28, § 452 (Supp. 1982-1983).

[7] S.D. CODIFIED LAWS ANN. § 35-5-3.1 (1977).

state[8] and two states offer tax rebates equivalent to specified annual expenditures in the state by brewers for plant and equipment.[9]

Hawaii's liquor tax discriminates in favor of okolehao (a brandy distilled from the root of the ti plant) and rum manufactured in the state.[10] Other states impose taxes favoring various types of beverage alcohol other than beer and wine manufactured from products of the taxing state.[11] One state discriminates in favor of beverages containing 14% or more alcohol manufactured in the state from products grown in the state, but only if the distiller and bottler operate in that state exclusively and have no affiliation with any out-of-state distiller or bottler.[12]

A number of states impose discriminatory taxes in retaliation for similar taxes imposed by other states. Three states impose this type of retaliatory tax on all beverage alcohol,[13] two states impose retaliatory taxes on

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[8] Ill. Ann. Stat. ch. 43, § 158 (Smith-Hurd Supp. 1983-1984); Iowa Code Ann. § 123.146.2 (West Supp. 1983-1984); Ky. Rev. Stat. Ann. § 243.720 (3) (Michie Supp. 1982); Minn. Stat. Ann. § 340.47. Subd. 2 (West Supp. 1983); R.I. Gen. Laws § 3-10-1 (Supp. 1982); Tex. Alco. Bev. Code Ann. § 203.08 (Vernon 1978).

[9] Or. Rev. Stat. § 473.030 (6) (1981); Pa. Stat. Ann. tit. 47, § 112.1 (Purdon Supp. 1983-1984).

[10] Hawaii Rev. Stat. § 244-4 (6), (8) (Supp. 1982).

[11] Ark. Stat. Ann. § 48-711 (1977); Ga. Code Ann. § 3-4-60 (1982); Me. Rev. Stat. Ann. tit. 28, § 501.1 (1964); Wisc. Act of July 1, 1983, Act 27, 1983 New Laws Page 45, SECTION 1494m, § 139.03(2t).

[12] Fla. Stat. Ann. § 565.12 (1)(b), Fla. Act of July 19, 1983, ch. 349, Section 15, Laws 1983, Senate Bill No. 3-XXX, Fla. Stat. Ann. § 565.12 (2)(b), § 565.14 (West Supp. 1983).

[13] Conn. Gen. Stat. Ann. § 12-451 (West 1983); Ind. Code Ann. § 7.1-2-7-3 (Burns 1978); R.I. Gen. Laws § 3-10-15, 16, 17 (1976).

beer and wine[14] and two states impose such taxes on beer.[15]

As this brief is written, legislation is pending in one state that would impose a tax on the retail selling price of liquor produced in the state at a rate of 12% while liquor produced elsewhere would be taxed at a rate of 18%.[16]

These discriminatory state taxes raise the spectre of increasing tax discrimination against out-of-state products unless the Court strikes down the tax exemptions that are the subject of this appeal.

SUMMARY OF ARGUMENT

DISCUS relies on the brief of appellants for the proposition that the Hawaii liquor tax violates the Import-Export and Equal Protection Clauses. This brief focuses on the burden the tax imposes on interstate commerce.

The tax exemptions at issue on this appeal are the type of discrimination favoring local enterprises that has been condemned by the Court as a violation of the basic purpose of the Commerce Clause.[17] The Twenty-first Amendment does not exempt this type of discrimination from the prohibitions of the Commerce Clause.

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[14] OHIO REV. CODE ANN. § 4301.54, 55 (Page 1982); OR. REV. STAT. § 473.040 (1981).

[15] DEL. CODE ANN. tit. 4, § 728(a) (1975); PA. STAT. ANN. tit. 47, § 105(b) (Purdon 1969).

[16] Pa. S. 407, Introduced February 24, Sess. of 1983.

[17] The Commerce Clause, art. I, § 8, cl. 3, provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

ARGUMENT

I. HAWAII'S TAX EXEMPTIONS FOR HAWAIIAN OKOLEHAO AND FRUIT WINE BURDEN INTERSTATE COMMERCE

In its decision below, the Supreme Court of Hawaii found that:

> The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.[18]

Discrimination favoring okolehao and fruit wine manufactured in Hawaii is the declared purpose of the exemptions. Therefore, this is not a case where the burden on interstate commerce must be weighed against some claimed non-discriminatory purpose. This is that "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977), quoting *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951).

HAWAII REV. STAT. § 244-4 (Supp. 1982) imposes a tax on all non-exempt beverage alcohol sold in Hawaii equal to 20% of the wholesale price. The parties have stipulated that being exempt from the liquor tax gives Hawaiian okolehao and fruit wine a substantial price advantage

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[18] *In re Bacchus Imports, Ltd.*, A-12-13, 65 Hawaii __, 656 P.2d 724, 730 (1982) (footnote omitted). (The first citation is to the indicated pages of the Appendix to Jurisdictional Statement.)

over out-of-state products subject to the tax. *See* Joint Appendix 10, 16-17, 23. Therefore, the discriminatory effect of the exemptions is undisputed.

These exemptions are prohibited under the holding of *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 337 (1977), that "in the process of competition no State may discriminatorily tax the products manufactured . . . in any other State." That is so clear that the intriguing question is how the court below could have reached any other result.

The Hawaii court acknowledged that the test of whether the liquor tax violates the commerce clause is whether the exemptions discriminate against interstate commerce.[19] However, in discussing the Commerce Clause the court ignored its own finding, quoted above at page 6, that the purpose of the exemptions is discrimination favoring locally manufactured products.

The court offered two reasons for its holding that the liquor tax does not discriminate against interstate commerce. The first was that the tax affects all wholesalers equally, regardless of where they are incorporated.[20] But that is irrelevant because the objection is that the tax discriminates against out-of-state products, not out-of-state wholesalers.

The second reason, and the real basis for the Hawaii court's conclusion that the tax does not violate the Commerce Clause, was that the taxpayers "failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce."[21]

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[19] A-22-24, 65 Hawaii at ___, 656 P.2d at 733.

[20] A-24-25, 65 Hawaii at ___, 656 P.2d at 733-34.

[21] A-30, 65 Hawaii at ___, 656 P.2d at 735 (footnote omitted).

Here the court was actually saying that the taxpayers had failed to show how much discrimination there is. But discrimination is established by the stipulated fact that the exemptions give Hawaiian okolehao and fruit wine a substantial price advantage over out-of-state products. See pages 6-7, above. The fact of discrimination having been stipulated, there is no need to show its extent. *Maryland* v. *Louisiana*, 451 U.S. 725, 759-60 (1981).

The record demonstrates that both the purpose and the effect of the Hawaii liquor tax is discrimination against out-of-state products in favor of local products, which is forbidden.

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the [Commerce] Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951).

Boston Stock Exchange v. *State Tax Commission*, 429 U.S. 318, 329 (1977). The apprehension expressed in that opinion of a "multiplication of preferential trade areas" was justified, as is shown by the discriminatory state beverage alcohol taxes discussed at pages 2-4 above.

II. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT STATE TAX DISCRIMINATION FAVORING LOCAL ENTERPRISES

The State of Hawaii does not claim that the exemptions of the Hawaii liquor tax are justified under the Twenty-

first Amendment.[22] There is no reference to the Twenty-first Amendment in the opinion of the Supreme Court of Hawaii below, nor is the Twenty-first Amendment cited in the State's motion to dismiss or affirm in this Court. The determination not to rely on the Twenty-first Amendment is well-considered.

Section 2 of the Twenty-first Amendment provides that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Nothing in that language suggests that states are given the power to favor local enterprises by discriminatory taxation.[23]

No decision of this Court has upheld a state's effort to promote local beverage alcohol by imposing a discriminatory tax on products brought into the state. No Supreme Court authority even arguably supports an interpretation of the Twenty-first Amendment that would permit this type of discrimination, with the possible exception of dictum in *State Board* v. *Young's Market Co.*, 299 U.S. 59 (1936). In that case California wholesalers challenged a state license fee of $500 for importing beer. The taxpayers argued that the fee violated the Commerce and Equal Protection Clauses. The Court held that the Twenty-first Amendment permits a state to impose a license fee for importing beer.

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[22] The State wrote in its answering brief in the Supreme Court of Hawaii below that "the State in the Tax Appeal Court and herein, has never attempted to justify its liquor tax under the Twenty-First Amendment, and the State asserts it needs no such justification." (R. 286.)

[23] Focusing on the language of the Amendment is supported by "sound cannons" of constitutional interpretation. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980).

Young's Market did not involve discrimination. California brewers were required to pay a license fee of $750 per year while beer importers were subject to a license fee of $500 per year. The Court held that this different classification "rests on conditions requiring difference in treatment." (*Id.* at 64.) However, despite the fact that discrimination was not an issue, the opinion asked a series of "can it be doubted that" questions about state authority to engage in various types of discrimination against out-of-state beer, including imposition of a "heavy importation fee".[24] None of the types of discrimination mentioned in those hypothetical questions was involved in *Young's Market* and none of those types of discrimination has been upheld by the Court in any other case. Assuming that the opinion intended to imply affirmative answers to its rhetorical questions, those answers do not express the holding of the Court in *Young's Market* or any other case.

In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), the Court wrote that a conclusion that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause

> would be patently bizarre and is demonstrably incorrect. . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution.

[24] The series of questions asked whether it can be doubted that a state may establish a state monopoly of the brewing and sale of beer while laying a "heavy impost" on imported beer or confining all imports to a single consignee. After implying that a state may prohibit beer imports without establishing a state brewing monopoly, and then stating that a state may permit the brewing and sale of beer while prohibiting "hard liquors," the opinion asked whether a state may not permit domestic breweries while subjecting imported beer to "a heavy importation fee?" (*Id.* at 63.)

> Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

The interest of the State of Hawaii in favoring local enterprises cannot prevail against the federal interest in "a competitive economy," *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980), and in "free trade among the several States," *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 335 (1977).

The Twenty-first Amendment does not permit a state to ignore the Import-Export Clause by imposing a discriminatory tax on imported beverage alcohol.[25] It would be anomalous to hold that the Amendment permits a state to impose a discriminatory tax on beverage alcohol from other states that it may not impose on beverage alcohol from other countries.

[25] *See Department of Revenue* v. *James Beam Co.*, 377 U.S. 341 (1964); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 288 n.7 (1976).

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted,

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Appellee.

On Appeal From The Supreme Court Of The State Of Hawaii

APPENDIX OF STATUTES OF *AMICUS CURIAE* DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

Table of Contents Continued

Table of Contents Continued

Table of Contents Continued

ALABAMA

ALA. CODE (Supp. 1982)

§ 28-6-1. Definitions.

When used in this chapter, the following words and phrases shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) NATIVE FARM WINERY. A winery where the annual production does not exceed 100,000 gallons, and 75 percent or more of the berries, fruit, produce or honey used in the manufacture of such wine is grown and produced in Alabama by the native farm winery permit holder upon land owned or leased by the permit holder in the vicinity of his farm winery.

(2) NATIVE FARM WINE. Any product having an alcohol content not to exceed 14 percent by volume and made in accordance with the revenue laws of the United States, which is produced on a native farm winery.

. . . .

§ 28-6-4. Privilege license tax imposed; excise tax levied; exception; monthly report and remittance; application to import fruit, etc., when not available; deposit of taxes.

. . . .

(b) There is hereby levied and assessed an excise tax upon each case of native farm wine sold by a manufacturer to any source to be collected from the manufacturer in an amount equal to $.05 per gallon. However, native farm wine produced in Alabama for export and sale without this state shall not be subject to said excise tax, but such tax shall accrue or be collected on native farm wines dispensed, as free samples in quantities of not more than six ounces, in the tasting room or wine cellar of a native farm winery. The excise tax provided for in this section shall be in lieu of all other taxes imposed.

. . . .

(d) Provided that such fruit, produce or honey used in the manufacture of native Alabama wine is not available in Alabama due to an act of God, the holder of a farm winery permit may apply to the Alabama alcoholic beverage control board for permission to import such produce.

. . . .

§ 28-7-3. Definitions.

The following words or phrases, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this section:

. . . .

(2) WINE. All beverages made from the fermentation of fruits, berries or grapes, with or without added spirits and produced in accordance with the laws and regulations of the United States, containing not more than 24 percent alcohol by volume, and includes all sparkling wines, carbonated wines, special natural wines, rectified wines, vermouths and like products, including restored or unrestored pure condensed juice.

(3) TABLE WINE. Any wine containing not more than 14 percent alcohol by volume. Table wine is not vinous liquor.

. . . .

§ 28-7-16. Tax on sale of table wine; amount; collection; disposition of proceeds; exclusive; exemption.

(a) LEVY.—There is hereby levied in addition to the license taxes provided for by this chapter and municipal and county license taxes and in addition to any marked-up price made by the board on wine sold by the board a privilege or excise tax measured by and graduated in accordance with the volume of sales of table wine and shall be an amount equal to 35 percent of the cost of table wine to the wholesale licensee or board, to be collected from the purchaser by the board or by a licensed retailer.

(b) COLLECTION.—The tax levied by subsection (a) of this section shall be added to the sales price of all table wine sold and shall be collected from the purchasers. The tax shall be collected in the first instance from the wholesaler where table wine is sold or handled by wholesale licensees, and by the board from whomever makes sales when table wine is sold by the board. It shall be unlawful for any person who is required to pay the tax in the first instance to fail or refuse to add to the sales price and collect from purchaser the required amount of tax, it being the intent and purpose of this provision that the tax levied is in fact a levy on the consumer. . . .

. . . .

ARKANSAS

ARK. STAT. ANN. (Supp. 1983)

§ 48-402. Rate of tax.

There is hereby levied and there shall be collected as provided by law and regulation the following taxes:

(a) A tax at the rate of two dollars and eighty-seven and one-half cents ($2.875) on each gallon of spiritous liquor sold or offered for sale in the State of Arkansas.

ARK. STAT. ANN. § 48.402 (1977)

(b) a tax at the rate of seventy-five cents (75¢) on each gallon of vinous liquor (except wines fermented and manufactured within the State of Arkansas, from grapes, berries or other fruits grown in Arkansas, as authorized by Act 69 of the Acts of the General Assembly of 1935, as amended (Ark. Stats. (1947) Sections 48-601—48-612), sold or offered for sale in the State of Arkansas.

. . . .

ARK. STAT. ANN. (Supp. 1983)

§ 48-603. Manufacture and sale lawful.—Hereafter, it shall be lawful to manufacture wine from the juices of grapes, berries, and other fruits, and from vegetables, grown in the State of Arkansas, and to sell the same in and out of this State. Provided, that during a period of a Native Wine Industry Disaster Relief Program, as declared by the Commissioner of Revenues of this State in the manner authorized by law, a native winery may acquire from sources outside this State quantities of grapes, berries, fruits, and/or vegetables, or, juices, pulp, or blendable wine produced therefrom, to be used in the manufacture of wine in this State, in quantities which do not exceed the percentage of each such product, as determined by the Native Wine Industry Disaster Relief order of the Commissioner of Revenues, as being representative of the percentage of each of said products during each year covered by the order of the Commissioner of Revenues deemed by him

to have resulted or to result from the loss of production due to the natural disaster, as determined by the Commissioner and set forth in his order. Whenever reference is made in this Act to the acquisition of grapes, berries, fruits, and/or vegetables from sources outside this State to be used for the purposes, and in the quantities authorized herein, for the production of native wines, said terms shall also be deemed to construe the acquisition of equivalent amounts thereof in the forms of juices, pulp, or blendable wines to be used in the manufacture or blending of native wines in this State within the allowable percentages of such products used in the preparation of such juices, pulp, or blendable wines as set forth in the Commissioner's order.

ARK. STAT. ANN. (1977)

§ 48-608. Tax upon the manufacture of wine.—For the privilege of manufacturing wine and selling it at the winery there is hereby imposed, assessed, and levied a tax of five cents (5¢) per gallon upon all wines manufactured under the provisions of this act [§§ 48-601—48-612], said tax to be paid by the manufacturer upon completion of fermentation. . . .

§ 48-636. Importation of wines for blending with local wines subject to tax.—(a) Arkansas wineries are hereby authorized to import into Arkansas, finished or unfinished wines for blending with Arkansas red or white wines. Such wines shall be shipped into this State and blended according to regulations as set forth in federal wine regulations and labeled according to 27 CFR 4.22 through 27 CFR 4.25 which requires that the appelation [appellation] of origin of "Arkansas Wines" can be used only on those wines which contain seventy-five per cent (75%) Arkansas grown grapes or other materials.

(b) The Arkansas winery shall pay a tax of seventy-five cents (75¢) per gallon on all such wines imported into this State if such wines are sold in Arkansas. The seventy-five cents (75¢) per gallon tax shall be required to be paid only on the portion of the blend not grown and produced in Arkansas. The tax on the Arkansas grown portion of the wine blend shall be the same as

now required for wines produced from Arkansas produced fruits and vegetables. . . .

. . . .

§ 48-707. **Manufacture and sale.**—It shall be lawful for any person under the terms and provisions hereof to manufacture and sell within the State of Arkansas and for export without the State of Arkansas brandy, cordials or other distillates, or their components, of and from agricultural or horticultural products, such as peaches, apples, cherries, plums, grapes, boysenberries, blackberries, and other fruits produced solely within the State of Arkansas, or both, when such person shall have become qualified to do so under the provisions hereof.

§ 48-708. **Application for permit—Residence requirements.**—Upon application by any qualified person, the Alcoholic Beverage Control Department, or any successor thereof performing its functions as now defined by law, shall issue to such person a manufacturers [manufacturer's] permit which shall authorize and permit such person to manufacture and sell under the terms and provisions hereof brandy, cordials or other distillates or component parts thereof manufactured solely from agricultural or horticultural products produced within the State of Arkansas; provided, no such permit shall be granted to any person, firm or corporation who shall not have been, or whose members or all the stockholders thereof, shall not have been a citizen and resident, maintaining bona fide residence and domicile with the State of Arkansas for a continuous period of five [5] years next preceding the date of making such application.

§ 48-711. **Tax on sales within state.**—The holder of such permit shall pay a tax of $1.00 per gallon, payable and collectible in the manner as in the case of other taxes on intoxicating liquors now provided on all of such products sold for consumption within the State of Arkansas to the holders of wholesale or retail liquor permits within the State. Such manufacturer may sell such products for export without the State, or to the manufacturers of native wine in the State for use in the

fortification thereof, free of payment of such taxes, under such rules and regulations as may be provided pursuant to the authority of his act.

CONNECTICUT

CONN. GEN. STAT. ANN. (West 1983)

§ 12-451. Additional reciprocal tax

"State," when used in this section, shall include the District of Columbia, any other state of the United States and any foreign country. If any other state imposes taxes on alcoholic beverages manufactured in Connecticut and brought into such other state in excess of the taxes imposed on alcoholic beverages manufactured in such other state, the Connecticut commissioner of revenue services shall, in addition to the tax on alcoholic beverages provided by this chapter, impose an additional tax on alcoholic beverages manufactured in such other state and brought into this state, which shall represent the excess of taxes imposed on Connecticut alcoholic beverages brought into such other state over the taxes imposed by such other state on alcoholic beverages manufactured in such other state. The commissioner of revenue services shall issue regulations relative to the levy of such additional tax, shall send a copy of such regulations to each licensed distributor, shall file a copy thereof with the state treasurer and a copy with the state comptroller, and shall further cause to be published in a newspaper having general circulation in such other state a notice relative to such additional tax.

DELAWARE

DEL. CODE ANN. tit. 4 (1975)

§ 728. Retaliatory beer tax and regulations; violations by out of state manufacturers of beer; hearing, penalties and appeal.

(a) In addition to compliance with all other provisions of this title, the Commission shall require each person, not a licensee of this State, who desires to sell beer manufactured outside this State to licensees of this State, to pay to the Commission the same fee or fees as are required to be paid in the State, territory or country of origin of such beer by a person, not a licensee thereof, who desires to sell beer manufactured in this State to licensees of such state, territory or country of origin. . . .

. . . .

FLORIDA

Act of July 19, 1983, ch. 349, Laws 1983, Senate Bill No. 3-XXX

. . . .

Section 14. [Subsection] (1) . . . of section 564.06, Florida Statutes, [is] amended to read:

§ 564.06 Excise taxes on wines and beverages; exemptions

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of <u>$2.25</u> ~~$1.75~~ per gallon.

FLA. STAT. ANN. § 564.06 (West Supp. 1983)

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida from Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

Act of July 19, 1983, ch. 349, Laws 1983, Senate Bill No. 3-XXX

. . . .

Section 14. [Subsection] . . . (3) . . . of section 564.06, Florida Statutes, [is] amended to read:

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 ~~$2.43~~ per gallon, except that this tax shall not be required to be paid upon all wines manufactured in Florida from fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

FLA. STAT. ANN. § 564.06 (West Supp. 1983)

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses from shrinkage, in filtering, breakage, and waste in bottling, said 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid, and said 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

. . . .

Act of July 19, 1983, ch. 349, Laws 1983, Senate Bill No. 3-XXX

. . . .

Section 15. Subsection (1) of section 565.12, Florida Statutes, is amended to read:

§ 565.12 Excise tax on liquors and beverages

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by all manufacturers, distributors and vendors a tax at the rate of $6.50 ~~$4.75~~ per gallon.

(b) As to all such beverages manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) shall not apply. However, in lieu thereof there shall be paid by all manufacturers and distributors a tax at the rate of $4.15 ~~$2.39~~ per gallon.

FLA. STAT. ANN. § 565.12 (West Supp. 1983)

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by all manufacturers, distributors, and vendors a tax at the rate of $9.53 per gallon.

(b) As to all such beverages manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) shall not apply. However, in lieu thereof there shall be paid by all manufacturers and distributors a tax at the rate of $4.75 per gallon.

. . . .

FLA. STAT. ANN. (West Supp. 1983)

§ 565.14 Requirements necessary to qualify for tax rate for Florida-grown products

(1) In order to qualify, in whole or in part, for the Florida tax rate provided in § 565.12(1)(b), (2)(b), an alcoholic bever-

age must be manufactured exclusively from raw materials, except for flavoring extracts, produced in Florida and may not be blended with whiskey produced in any other state. Such beverage must be either distilled and bottled by a distiller licensed under § 565.03(1)(a) 1. and (b) who conducts distilling operations only in Florida and in no other state, or bottled by a bottler licensed under § 565.03(1)(a) 2. who conducts bottling operations only in Florida and in no other state. Such beverages shall bear a Florida sunburst emblem no smaller than one half inch in diameter reading "Made in Florida."

(2) If a Florida distiller is an individual or copartnership, such individual or copartnership shall be deemed to be conducting distilling operations in a state other than Florida if the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged, directly, indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (3), in distilling spirituous liquors in any state other than the state of Florida.

(3) If a Florida distiller shall be a corporation, such corporation shall be deemed to be engaged in distilling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation, which is engaged in distilling spirituous liquors in any state other than Florida, or when such corporation is controlled by, or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in distilling spirituous liquors in any state other than Florida.

(4) If a Florida bottler is an individual or copartnership, such individual or copartnership shall be deemed to be conduct-

ing bottling operations in a state other than Florida in the event the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (5) in bottling spirituous liquors in any state other than Florida.

(5) If a Florida bottler is a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in bottling spirituous liquors in any state other than Florida.

GEORGIA

GA. CODE ANN. (1982)

§ 3-4-60. Levy and amount of tax.

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

§ 3-6-1. Definitions.

As used in this chapter, the term:

(1) "Dessert wine" means a wine having an alcoholic strength of more than 14 percent alcohol by volume but not more than 21 percent alcohol by volume.

. . . .

(4) "Table wine" means a wine having an alcoholic strength of not more than 14 percent alcohol by volume.

. . . .

GA. CODE ANN. (Supp. 1983)

§ 3-6-50. Levy and amount of tax.

There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that

portion that is produced from fruits and berries grown within the state; and

(B) Forty cents per liter and a proportionate tax on [sic] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on [sic] like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter; and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67¢ per liter and a proportionate tax at the same rate on all fractional parts of a liter.

HAWAII

HAWAII REV. STAT. (Supp. 1982)

§ 244-4 Tax; limitations. Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty per cent of the wholesale price of the liquor so sold or used; provided that the tax shall be paid only once upon the same liquor; provided further that the tax shall not apply to:

. . . .

(6) Okolehao manufactured in the State for the period May 17, 1971 to June 30, 1981;

(7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981; or

(8) Rum manufactured in the State for the period May 17, 1981 to June 30, 1986.

HAWAII REV. STAT. (1976)

§ 281-1 Definitions.

"Liquor" or "intoxicating liquor" includes alcohol, brandy, whiskey, rum, gin, okolehao, sake, beer, ale, porter, and wine; and also includes, in addition to the foregoing, any spiritous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, in whatever form and of whatever constituency and by whatever name called, containing one-half of one percent or more of alcohol by volume, which are fit for use or may be used or readily converted for use for beverage purposes.

. . . .

ILLINOIS

ILL. ANN. STAT. ch. 43, § 158 (Smith-Hurd Supp. 1983-1984)

§ 8-1. . . . . A tax is imposed upon the privilege of engaging in business as a manufacturer of beer or as an importing distributor of beer at the rate of 7¢ per gallon on all beer manufactured and sold or used by such manufacturer, or as agent for any other person, sold or used by such importing distributor, or as agent for any other person. Any brewer manufacturing beer in this State shall be entitled to and given a credit or refund of 75% of the tax imposed on each gallon of beer up to 4.9 million gallons per year in any given calendar year for tax paid or payable on beer produced and sold in the State of Illinois.

The credit or refund created by this Act shall apply to all beer taxes in the calendar years 1982 through 1986.

. . . .

INDIANA

IND. CODE ANN. (Burns 1978)

§ 7.1-1-3-44. Small winery.—The term "small winery" means a commercial winemaking establishment that produces table wine in any amount allowed by IC 1971, 7.1-3-12-4, from products allowed by that section.

§ 7.1-1-3-46. Table wine.—The term "table wine" means wine that is produced without rectification or fortification and whose alcoholic content does not exceed fourteen percent [14%].

§ 7.1-2-7-1. Power of commission.—The commission shall have the duty to make and enter orders with respect to alcoholic beverages manufactured, processed, or transported from, outside this state and imported into this state as will most effectively produce the discontinuance of discrimination by another state, territory, district, political subdivision, municipality, or person against alcoholic beverages produced in Indiana.

§ 7.1-2-7-2. Investigations.—The commission, from time to time, either on its own initiative or on complaint of a resident of this state, shall make, or cause to be made, investigations of the laws, rules, regulations, ordinances and practices of the several states, territories, districts, political subdivisions and municipalities of the United States outside the state of Indiana, relating to alcoholic beverages manufactured or processed in or exported from, this state. The purpose of these investigations shall be to determine whether these laws, rules, regulations, ordinances and practices unfairly or unreasonably discriminate against alcoholic beverages manufactured or processed in or exported from this state, or in favor of a person outside this state.

§ 7.1-2-7-3. Discrimination—Entrance of orders.—If, upon investigation, the commission finds that discrimination does exist, it shall make and enter one [1] of the following orders:

(a) Prohibiting the importation, transportation, purchase, receipt, sale, delivery, distribution, or possession into or within this state, of alcoholic beverages, or one or more classes of them, manufactured or processed in or by, or exported from, the place or person outside this state, as in its opinion will produce most effectively the discontinuance of the discrimination; or,

(b) Providing for a levy, assessment, collection and imposition of additional taxes, licenses, fees and restrictions upon or in connection with the privilege of importing, transporting, purchasing, receiving, selling, delivering, distributing or possessing, into or within this state, of alcoholic beverages, or one or more classes of them, which are manufactured or processed in or by, or imported, transported or received from, a place or person outside this state, as in its opinion will produce most effectively the discontinuance of the discrimination.

§ 7.1-3-12-4. **General requirements.**—In order to be considered a "small winery" within the meaning of this title and to be eligible to receive a small winery permit, a wine-making establishment shall meet the following requirements:

(a) It shall produce table wine from grapes, other fruits, or honey, produced in this state; and,

(b) Its annual production of table wine shall not exceed one hundred thousand [100,000] gallons.

IND. CODE ANN. (Burns Supp. 1982)

§ 7.1-4-4-1. **Rate of tax.**—An excise tax at the rate of forty-seven cents [47¢] a gallon is imposed upon the manufacture and sale or gift, or withdrawal for sale or gift, of wine within this state. However, in the case of the holder of a small winery permit, the excise tax rate is twenty-seven cents [27¢] a gallon.

IOWA

IOWA CODE ANN. (West Supp. 1983-1984)

§ 123.136. Barrel tax

In addition to the annual permit fee to be paid by all class "A" permittees under the provisions of this chapter there shall be levied and collected from such permittees on all beer manufactured for sale or sold in this state at wholesale and on all beer imported into this state for sale at wholesale and sold in this state at wholesale, a tax of four and thirty-four hundredths dollars for every barrel containing thirty-one gallons, and at a like rate for any other quantity or for the fractional part of a barrel. However, no tax shall be levied or collected on beer shipped outside this state by a class "A" permittee or sold by one class "A" permittee to another class "A" permittee.

. . . .

§ 123.146. Barrel tax rebate

1. Any class "A" permittee which owns and operates a brewery located in Iowa and which is not disqualified under subsection 3 of this section is entitled to the barrel tax rebate provided in subsection 2 of this section.

2. Upon application, a class "A" permittee entitled to a rebate under this section shall receive a rebate of fifty percent of the barrel tax paid under section 123.136 for each barrel of the first fifty thousand barrels taxed in each year. . . .

3. A class "A" permittee which owns and operates a brewery located in Iowa shall be disqualified for the barrel tax rebate provided in subsection 2 of this section if either of the following apply:

a. The amount manufactured in this state by that class "A" permittee and sold in this state, but excluding any amounts shipped outside of this state by any class "A" permittee, exceeds one hundred fifty thousand barrels annually.

b. That class "A" permittee, together with all other persons controlling, controlled by, or under common control with that class "A" permittee, manufacture at one or more locations within or without Iowa, an amount sold in this state, but excluding any amounts shipped outside of this state by any class "A" permittee, which exceeds one hundred fifty thousand barrels annually.

4. The rebate provided in subsection 2 of this section shall apply only to the barrel tax incurred on beer manufactured after August 15, 1977.

. . . .

KANSAS

KAN. STAT. ANN. (1981)

§ 41-102. Definitions. As used in this act, unless the context clearly requires otherwise:

. . . .

(g) "Domestic table wine" means wine which contains not more than 14% alcohol by volume and which is manufactured without rectification or fortification from agricultural products grown in this state.

(h) "Farm winery" means a winery licensed by the director to manufacture, store and sell domestic table wine.

LIQ. CONT. L. SERV. (CCH) Kansas.

[¶ 7170]

§ 41-501. Manufacturers and wholesale distributors: rates of tax; "gallon" and "federal area" defined; exemptions; collection and disposition of tax; importation for scientific, chemical, experimental or mechanical purpose; permit; fee; report. (a) As used in this section . . .: (1) "Gallon" means "wine gallon."

(2) "Federal area" means any lands or premises which are located within the exterior boundaries of this state and which are held or acquired by or for the use of the United States or any department, establishment or agency of the United States.

[¶ 7171]

(b)(1) For the purpose of raising revenue a tax is imposed upon the manufacturing, using, selling, storing or purchasing alcoholic liquors in this state or a federal area at a rate of . . . $.15 per gallon on domestic table wine; $.30 per gallon on wine containing 14% or less alcohol by volume . . . .

. . . .

[¶ 7178]

. . . .

(g) Retail sales of alcoholic liquor and beer and sales of wine to consumers by farm wineries shall not be subject to the tax imposed by the Kansas retailers' sales tax act but shall be subject to the enforcement tax provided for in this act.

. . . .

KAN. STAT. ANN. (1981)

§ 79-3603. Tax imposed; rate. For the privilege of engaging in the business of selling tangible personal property at retail in this state or rendering or furnishing any of the services taxable under this act, there is hereby levied and there shall be collected and paid a tax as follows:

(a) A tax at the rate of 3% upon the gross receipts received from the sale of tangible personal property at retail within this state;

. . . .

KENTUCKY

KY. REV. STAT. ANN. (Michie Supp. 1982)

§ 243.720. Rate of tax.—

. . . .

(3)(a) There is levied upon the sale or distribution by sale or gift of malt beverages an excise tax of two dollars and fifty cents ($2.50) on each barrel of thirty-one (31) gallons and a proportional rate per gallon on malt beverages sold or distributed in any container of more or less than thirty-one (31) gallons.

(b) Each brewer producing malt beverages in this state shall be entitled to a credit of fifty percent (50%) of the tax levied on each barrel of malt beverages sold in this state, up to 300,000 barrels per annum.

. . . .

MAINE

ME. REV. STAT. ANN. tit. 28 (Supp. 1982-1983)

§ 452. Excise tax on malt liquor; deficiency account; credits; refunds

There shall be levied and imposed an excise tax on all malt liquor manufactured in this State of 5⅓¢ per gallon, or its metric equivalent, to be paid by the manufacturer in addition to the fee provided by law. A wholesale licensee who imports malt liquor shall pay an excise tax of 25¢ per gallon, or its metric equivalent, and at a like rate for any multiple or fraction thereof.

There shall be levied and imposed an excise tax of 30¢ per gallon, or its metric equivalent, or fraction or multiple thereof, on all table wine containing 14¢ [sic] or less alcohol by volume imported into this State; except the excise tax shall be 20¢ per gallon, or its metric equivalent, or fraction or multiple thereof on all still wine containing 14% or less alcohol by volume which is manufactured or bottled in this State; and an excise tax of $1 per gallon, or its metric equivalent, or multiple or fraction thereof on all sparkling wines manufactured in or imported into this State. Such taxes shall be paid by the Maine manufacturer or the importing wholesaler.

. . . .

ME. REV. STAT. ANN. tit. 28 (1964)

§ 501. Manufacturers' licenses; sales; transportation; fees

. . . . The following license fees shall be charged:

1. **Distillers and brewers.** Distillers and brewers using exclusively the agricultural products of this State as raw material for the production of alcohol or alcoholic liquors . . . $100. Distillers and brewers using exclusively the agricultural products of other states as raw material . . . $3,000. Distillers and brewers using in part agricultural products of this State and in part those of other states as raw material shall pay such fee as the commission may determine, to be directly proportioned as

to the source and quantity of such raw material and based upon the foregoing differential. In case Maine agricultural products are not available for use as raw material by distillers and brewers in any particular year, the commission is authorized to make such adjustment in said fees as they deem just and equitable, resulting in a final computation of not less than $1,500.

. . . .

ME. REV. STAT. ANN. tit. 28, § 501 (Supp. 1982-1983)

4. **Wineries.** Wineries using exclusively the agricultural products of this State as raw material shall pay an annual license fee of . . . $50. Wineries using in part the agricultural products of other states or foreign countries shall pay, in addition to such license fee of $50, an excise tax of 4¢ per gallon, or its metric equivalent, on liquid raw materials and 2¢ per pound on solid or semisolid raw materials; the same being under the supervision of the commission, which shall make the necessary rules and regulations for their collection.

. . . .

MARYLAND

MD. ANN. CODE art. 4 (1981)

§ 5. Manufacturer's licenses.

. . . .

(d) *Winery license.*—A Class 3 manufacturer's license shall be designated as a winery license and shall entitle the holder to establish and operate in this State a plant for fermenting and bottling wine at the location therein described, to import bulk wine from the holder of a nonresident dealer's permit, and to sell and deliver wine to any wholesale licensee or permit holder in this State, or person outside of this State authorized to acquire same or to sell wine made from products grown in Maryland at a retail price at the plant to persons participating in a guided tour of the facility. The purchase shall be limited to not more than one quart per person per year provided the purchaser has attained the Maryland legal drinking age.

(e) *Limited winery license* . . . .—(1) A Class 4 manufacturer's license is designated as a limited winery license. The license entitles the holder to establish and operate in this State a plant for fermenting and bottling wine made from Maryland agriculture products at the location described, unless the Secretary of Agriculture determines that there is insufficient supply available of Maryland agriculture products. The license holder may sell and deliver this wine to any licensee or permit holder in this State, or person outside of this State, authorized to acquire it or to sell this wine made at the plant to persons participating in a guided tour of the facility. The purchase is limited to one quart of each brand per person per year. Any person who has attained the Maryland legal drinking age may purchase the wine. The licensee may operate only in one location in the State.

. . . .

MD. ANN. CODE art. 4 (Supp. 1982)

§ 133. Tax on wines and liquors.

(a) A tax is imposed on all distilled spirits and other alcoholic beverages except beer sold or delivered by a manufacturer or wholesaler to any retail dealer in this State.

(b) Except as provided in subsection (g) of this section . . . the amount of tax is:

(1) In the case of wine, 40 cents per gallon or 10.57 cents per liter;

. . . .

(g) From July 1, 1982, through June 30, 1987, only if a winery is classified as a Class 3 or Class 4 winery under § 5 of this article and makes wine from agricultural products grown in this State, the tax is 2 cents per gallon or .528 cents per liter on the wine fermented by the winery from agricultural products grown in this State.

MICHIGAN

MICH. STAT. ANN. (Callaghan Supp. 1983-1984)

§ 18.987(1) **Tax on wines containing less than 17% alcohol made from grapes not grown in state.**] SEC. 16a. (1) There shall be levied and collected by the commission on all wines [containing 16% or less of alcohol by volume] sold in this state and manufactured from grapes or fruits not grown in this state, a tax at the rate of [13.5] cents per ♦ [liter] if sold in bulk and in a like ratio if sold in smaller quantities.

Tax on wines containing more than 16% alcohol.] [(2) There shall be levied and collected by the commission on all wines containing more than 16% of alcohol by volume sold in this state a tax at the rate of 20 cents per liter if sold in bulk and in a like ratio if sold in smaller quantities.]

Tax reduction, procedure, statement, filing; additional rules; notice of intention to comply with act.] [(3)] The commission shall reduce ♦ [by 12.5] cents per ♦ [liter the tax specified in subsection (1) and shall reduce by 19 cents per liter the tax specified in subsection (2)] on all wines manufactured in Michigan from grapes grown in Michigan, for which the wineries, blenders, or rectifiers have paid ♦ the Michigan grape growers $100.00 per ton, or more, at the shipping point, the buyer furnishing at his or her expense, all necessary packages or containers and paying transportation charges beyond the shipping point. [Not less than $100.00 of the minimum payment specified in this subsection shall be paid in cash by December 15 of the year in which the grapes are delivered. The remainder of the minimum payment shall be made by a promissory note payable without interest before April 16 of the year following the delivery of the grapes.] The tax shall also be reduced [as provided in this subsection] on [all] wines manufactured in Michigan from Michigan grown fruits, other than grapes, and also on these wines when blended with wine or wine spirits manufactured in Michigan and also blended with wine or wine spirits manufactured from grapes and fruits not grown in Michigan, when the blend does not use in the finished

product over 25% in volume of wines or wine spirits manufactured outside the state of Michigan. All wines not manufactured and not entitled to tax reduction as provided in this section shall be subject to and shall pay to the commission the full amount of tax as provided in this act . . . .

MINNESOTA

MINN. STAT. ANN. (West Supp. 1983)

§ 340.435. Farm winery licenses

Subdivision 1. For purposes of this section and of section 340.436:

(a) "Farm winery" means a winery operated by the owner of a Minnesota farm and producing table or sparkling wines from grapes, grape juice, other fruit bases or honey with a majority of the ingredients grown or produced in Minnesota.

(b) "Table or sparkling wines" means a beverage made without rectification or fortification and containing not more than 25 percent of alcohol by volume and made by the fermentation of grapes, grape juice, other fruits or honey.

. . . .

Subd. 3. A license shall authorize the sale on the farm winery premises of table or sparkling wines produced by that farm winery at on-sale or off-sale in retail or wholesale lots, in total quanitites not in excess of 50,000 gallons in any calendar year, glassware, wine literature and accessories, and the dispensing of free samples of the wines offered for sale. . . .

. . . .

Subd. 5. If Minnesota produced or grown grapes, grape juice, other fruit bases or honey is not available in quantities sufficient to constitute a majority of the table or sparkling wine produced by a farm winery, the holder of the farm winery license may file an affidavit stating this fact with the commissioner of public safety. If the commissioner determines, after consultation with the commissioner of agriculture, this to be true, the farm winery may use imported products and shall continue to be governed by the provisions of this section and section 340.436. The affidavit is effective for a period of one year, after which time the farm winery shall use the required amount of Minnesota products as provided by subdivision 1 unless the farm winery holder files a new affidavit with the commissioner.

§ 340.436. Taxation

In lieu of all taxes imposed by Minnesota Statutes, Section 340.47, there shall be levied and collected on all table or sparkling wines manufactured or produced by a Minnesota farm winery, the following excise tax:

(a) Wines containing 14 percent or less of alcohol by volume, the sum of 4 cents per liter;

(b) Wines containing more than 14 percent of alcohol by volume, the sum of 13 cents per liter.

. . . .

§ 340.47. Excise tax

Subdivision 1. On intoxicating liquors. There shall be levied and collected on all intoxicating liquors manufactured, imported, sold or in possession of any person in this state . . . except the natural fermentation of fruit juices in the home for family use the following excise tax:

(1) On all table wine containing 14 percent or less of alcohol by volume, the sum of 27 cents per gallon;

(2) On all wines containing more than 14 percent and not exceeding 21 percent of alcohol by volume, the sum of 79 cents per gallon;

(3) On all wines containing more than 21 percent and not exceeding 24 percent of alcohol by volume, the sum of $1.58 per gallon;

(4) On all wines containing more than 24 percent of alcohol by volume, the sum of $3.08 per gallon;

(5) On all natural and artificial sparkling wines containing alcohol, the sum of $1.50 per gallon;

. . . .

Subd. 1a. Metric containers. In lieu of the tax imposed by subdivision 1, there shall be levied and collected on all in-

toxicating liquors manufactured, imported, sold or in possession of any person in this state when packaged in containers where the net contents is stated in metric units of measure . . . except the natural fermentation of fruit juices in the home for family use the following excise tax:

(1) On all table wine containing 14 percent or less of alcohol by volume, the sum of seven cents per liter;

(2) On all wines containing more than 14 percent and not exceeding 21 percent of alcohol by volume, the sum of 21 cents per liter;

(3) On all wines containing more than 21 percent and not exceeding 24 percent of alcohol by volume, the sum of 42 cents per liter;

(4) On all wines containing more than 24 percent of alcohol by volume, the sum of 81 cents per liter;

(5) On all natural and artificial sparkling wines containing alcohol, the sum of 40 cents per liter;

. . . .

Subd. 2. On fermented malt beverages. An excise tax is hereby assessed, imposed, and levied upon the sale, either directly or indirectly of fermented malt beverages other than for shipment in interstate or foreign commerce. . . . Such tax shall be levied and collected at the rate of $2 per barrel of 31 gallons, containing not more than 3.2 percent of alcohol by weight, and a tax of $4 per barrel of 31 gallons containing more than 3.2 percent of alcohol by weight, and at a proportional rate for fractional parts thereof. . . . Any brewer producing and selling within this state fermented malt beverages shall receive a credit of $2 per barrel on the first 75,000 barrels, regardless of alcohol content.

MISSISSIPPI

MISS. CODE ANN. (Supp. 1982)

§ 27-71-7. Excise taxes; markup for benefit of "alcoholism treatment and rehabilitation fund".

(1) There is hereby levied and assessed an excise tax upon each case of alcoholic beverages sold by the commission to be collected from each retail licensee at the time of sale in accordance with the following schedule:

(a)	Distilled spirits	$2.50 per gallon
(b)	Sparkling wine and champagne ...	$1.00 per gallon
(c)	Wines	$ .35 per gallon
(d)	Native wines	$ .05 per gallon

. . . .

MISS. CODE ANN. (1972)

§ 67-5-5. Definitions; qualification period.

For purposes of this chapter, the following words and phrases shall have the definitions ascribed herein, unless the context otherwise requires:

(a)(i) "Native wine" shall mean any product, produced in Mississippi for sale, having an alcohol content not to exceed twenty-one percent (21%) by weight and made in accordance with revenue laws of the United States, which shall be obtained primarily from the alcoholic fermentation of the juice of ripe grapes, fruits, berries or vegetables grown and produced in Mississippi; provided that bulk, concentrated or fortified wines used for blending may be produced without this state and used in producing native wines. . . . In order to be classified as "native wine" under the provisions of this chapter, at least fifty-one percent (51%) of the finished product by volume shall have been obtained from fermentation of grapes, fruits, berries or vegetables grown and produced in Mississippi.

(ii) However, upon a showing to the state tax commission by any person that grapes, fruits, berries or vegetables are not available in Mississippi in sufficient quantities required for the production of native wines, the state tax commission shall establish for that person a qualification period of three (3) years, which shall begin to run upon the issuance of a permit as required by this paragraph, which shall be issued only after a showing to the state tax commission by that person that such person has planted a sufficient amount of grapes, fruits, berries or vegetables to meet the content requirement of fifty-one percent (51%) for native wines within the qualification period. Within the qualification period, such person engaged in the production of wines shall be allowed to operate as a producer of native wines even though the bulk of the raw grapes, fruits, berries or vegetables used in producing such wines are obtained without this state. . . . Any person engaged in the production of native wines during the qualification period shall pay the excise taxes imposed upon wines rather than that imposed on native wines during such period, as provided in section 27-71-7.

During the qualification period, every person shall use only the raw grapes, fruits, berries or vegetables obtained from within or without the state to produce native wines; provided, however, that for purposes of blending, bulk, concentrated or fortified wines which constitute no more than forty-nine percent (49%) of the native wine may be used. . . .

. . . .

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. (Supp. 1981)

§ 178-A:2 Retail Wine License. A retail wine license may be issued by the commission to any person operating a retail outlet in this state which shall permit the holder thereof to sell wines directly to individuals at retail on the premises for consumption off the premises. . . .

§ 178-A:4 Price Restricted.

I. Retail prices of wines sold under the provisions of this chapter shall not be less than the selling price established by the commission of said wine in the state liquor stores. The selling price of wine sold under this section shall not be less than 144 percent of the wholesale cost on non-New Hampshire produced American wine, 140 percent of the wholesale cost on imported wines, and 130 percent of the wholesale cost of wines produced from New Hampshire-grown products.

II. The price of all wine sold shall be sufficient to pay for the cost of the wine purchased, plus the operating expenses of the state stores, plus a proportionate part of the overhead expenses of the commission, plus an additional charge; all to be determined by the commission.

NEW JERSEY

N.J. STAT. ANN. (West Supp. 1983-1984)

§ 33:1-10. Class A licenses; subdivisions; fees

Class A licenses shall be subdivided and classified as follows:

. . . .

Plenary winery license

2a. The holder of this license shall be entitled, subject to rules and regulations, to manufacture any fermented wines, and to blend, fortify and treat wines, and to sell and distribute his products to wholesalers and retailers licensed in accordance with this chapter and to churches for religious purposes, and to sell and distribute without this State to any persons pursuant to the laws of the places of such sales and distribution, and to maintain a warehouse. The fee for this license shall be $750.00. Upon payment of an additional fee of $200.00 for each but not in excess of two premises, in addition to the licensed premises of the winery, the holder of this license shall have the right to sell such wine at retail for consumption on or off the premises as is manufactured, blended, fortified or treated by the licensee in his licensed premises and sold ~~at~~ *as* licensee's products under the label or labels of the licensee or in lieu of such additional fee of $200.00 but upon payment of an additional fee of $600.00 the holder of this license shall have the right to sell wines and other alcoholic beverages at retail in the licensed premises; provided, however, that such sales shall be made only for consumption off the licensed premises; and provided further, that such wines and other alcoholic beverages shall be manufactured or blended, fortified, distilled or treated by the licensee in his licensed premises or by the licensee's subsidiary corporation and sold only under the label of [sic] labels of the licensee. The combined total number of plenary winery licenses having retail privileges, shall not exceed one per each million of population in the State as shown by the last preceding Federal census. In the granting of such plenary winery licenses, the Director of the Division of Alcoholic Beverage Control may, in

the exercise of his discretion and pursuant to such rules and regulations as he may adopt, give prior consideration to applicants engaged in growing and cultivating grapes upon land owned by the applicant, having an area not less than 3 acres. The containers of all wine sold at retail by such licensee shall have attached thereto a label setting forth such information as shall be required by the rules and regulations of the Director of Alcoholic Beverage Control.

~~Limited~~ Farm winery license

2d. The holder of this license shall be entitled, subject to rules and regulations, to manufacture any ~~naturally~~ fermented wines and fruit juices in a quantity to be expressed in said license, dependent upon the following fees and not in excess of ~~5,000~~ 50,000 gallons per year and to sell and distribute his products to wholesalers and retailers licensed in accordance with this chapter and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution, and to maintain a warehouse and to sell at retail to consumers; provided, however, that such sale to consumers shall be made only for consumption off the licensed premises and then only when the winery at which such ~~naturally~~ fermented wines and fruit juices are manufactured is located and constructed upon a tract of land owned exclusively by the holder of such ~~limited~~ farm winery license, which said tract of land shall have an area of not less than 3 acres and have growing and under cultivation upon said land at least 1,200 grape vines; and provided, further, that such ~~naturally~~ fermented wines and fruit juices shall be manufactured only from ~~fresh~~ grapes or fruit grown in this State. The containers of all wine sold to consumers by such licensee shall have attached thereto a label stating in substance that the wine has been produced from 100% New Jersey grown fruit and setting forth such information as shall be required by the rules and regulations of the Director of Alcoholic Beverage Control. The fee for this license shall be graduated as follows: To so manufacture between 2,500 and ~~5,000~~ 50,000 gallons per annum, ~~$400.00~~

$200.00; to so manufacture between 1,000 and 2,500 gallons per annum, ~~$200.00~~ $100.00; to so manufacture less than 1,000 gallons per annum, ~~$100.00~~ $50.00.

The license granted hereunder shall authorize, subject to such rules and regulations as may be deemed necessary or appropriate by the Director of the Division of Alcoholic Beverage Control, the offering and tasting on the licensed premises of free samples of wine, to visitors and prospective retail customers.

For the purposes of this subsection, with respect to farm winery licenses, "manufacture" means the vinification, aging, storage, blending, clarification, stabilization and bottling of wine or juice from 100% New Jersey grown fruit.

. . . .

§ 54:43-1. Tax rates

There are hereby levied and imposed upon any sale of alcoholic beverages made within this State or upon any delivery of alcoholic beverages made within or into this State the following excise taxes:

. . . .

e. Wines, vermouth and sparkling wines—at the rate of $0.30 a gallon; except that wine manufactured by holders of a farm winery license, or wine manufactured from grapes or fruit grown in this State by holders of a plenary winery license issued pursuant to the provisions of R.S. 33:1-10 shall be taxed at a rate of $.10 a gallon.

NEW MEXICO

LIQ. CONT. L. SERV. (CCH) New Mexico.

[¶ 7065]

§ 7-17-5. Imposition and Rate of Liquor Excise Tax. — There is imposed on any wholesaler who purchases alcoholic beverages on which the tax imposed by this section has not been paid an excise tax at the following rates on alcoholic beverages so purchased:

. . . .

C. on wine, twenty-five cents ($.25) per liter.

N.M. STAT. ANN. (1981)

§ 60-6A-11. Grower's Permit.

Exempt from the payment of any license fee or the procurement of any license under the terms of the Liquor Control Act, but not from the procurement of a "grower's permit" under rules to be prescribed by the director, is any person who is the lessee or proprietor of any vineyard, orchard, farm or apiary in this state who may make and sell at wholesale or retail the wine made from grapes, fruit or any other agricultural products grown in the vineyard, orchard, farm or apiary. Any person granted a grower's permit pursuant to this section shall be exempt from any excise tax provided for in the Liquor Excise Tax Act on the sale of wine made from grapes, fruit or any other agricultural products grown in the vineyard, orchard, farm or apiary.

NORTH CAROLINA

N.C. Gen. Stat. (Supp. 1981)

§ 105-113.68. Definitions.

(a) As used in this Article:

. . . .

(2) "Fortified wine" means any wine made by fermentation from grapes, fruits, berries, rice, or honey, to which nothing has been added other than pure brandy made from the same type of grape, fruit, berry, rice, or honey that is contained in the base wine, and which has an alcoholic content of not more than twenty-four percent (24%) alcohol by volume.

. . . .

(8) "Unfortified wine" means wine that has an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar, and that has an alcoholic content of not less than six percent (6%) and not more than seventeen percent (17%) alcohol by volume.

. . . .

§ 105-113.86. Additional tax.

. . . .

(o) In addition to the license taxes herein levied, a tax is levied upon the sale of unfortified wine at the rate of twenty-one cents (21¢) per liter. Provided, however, that the tax upon the sale of unfortified wine manufactured in North Carolina and composed principally of fruits or berries grown in North Carolina shall be taxed at the rate of one and one-fourth cents (1¼¢) per liter.

. . . .

N.C. Gen. Stat. (1979)

§ 105-113.95. Tax on fortified wines.—In addition to all other taxes levied in this Article, there is levied a tax upon the sale of fortified wines of twenty-four cents (24¢) per liter.

Provided, however, that the tax upon the sale of fortified wine manufactured in North Carolina and composed principally of fruits or berries grown in North Carolina shall be taxed at the rate of one and one-fourth cents (1¼¢) per liter.

OHIO

OHIO REV. CODE ANN. (Page 1982)

§ 4301.54 Retaliatory taxes, fees, and charges.

If the laws of another state, territory, or nation, or the rules and regulations of an administrative body therein, provide for the levy and collection of taxes, fees, and charges upon the products of Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquors when such products are sold in, delivered, or shipped into such other state, territory, or nation, in excess of the taxes, fees, and charges levied and collected on the products of manufacturers or brewers of said states, whether such taxes, fees, and charges are in the nature of an excise, sales, or import tax, or by whatever name designated, the tax commissioner shall levy and collect additional taxes, fees, and charges on the products of manufacturers of wine or manufacturers and brewers of beer and other malt liquor of said other state, territory, or nation when sold in, delivered, or shipped into this state.

Such additional taxes, fees, and charges shall be in excess of those provided for in other sections of Chapters 4301., 4303. and 4307. and section 4305.13 of the Revised Code, in the same proportion or in the same amount as taxes, fees, and charges levied and collected in said state upon the products of Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquor are in excess of those levied and collected on the products of manufacturers and brewers of said state.

If the laws of another state, territory, or nation, or the rules and regulations of the administrative body therein, provide for the levy and collection of taxes, fees, or charges against Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquor for the privilege of doing business therein, like amounts shall be levied and collected on manufacturers or brewers of said state, territory, or nation for the privilege of doing business in this state.

§ 4301.55 Retaliatory tax on sale of beer or liquor manufactured in another state. (GC § 6064-67a)

If the laws of another state, territory, or nation, or the rules and regulations of any administrative body therein, authorize or impose any tax, fee, or charge upon the right to transport or import into such state any beer, malt liquor, or wine manufactured in this state; or authorize or impose any different warehousing requirements or higher warehousing or inspection fees upon any beer, malt liquor, or wine manufactured in this state and imported into or sold in such state than are imposed upon beer, malt liquor, and wine manufactured in such state; or impose any higher fee for the privilege of selling or handling beer, malt liquor, or wine manufactured in this state than is imposed for the privilege of handling or selling the same kind of beverages manufactured within such state or any other state, the tax commissioner shall levy and collect similar taxes, fees, and charges from licensees or persons selling in Ohio beer, malt liquor, and wine manufactured in such other state, territory, or nation. Such taxes, fees, and charges shall be in addition to the taxes, fees, and charges assessed and collected by the commissioner under section 4301.54 of the Revised Code.

OREGON

OR. REV. STAT. (1981)

§ 473.030 Tax on malt and alcoholic beverages. (1) A tax hereby is imposed upon the privilege of engaging in business as a manufacturer or as an importing distributor of malt beverages at the rate of $2.60 per barrel of 31 gallons on all such beverages.

. . . .

(6) A tax credit or credits up to the amount of $200,000 in any year shall be allowed against the taxes imposed by subsection (1) of this section where a taxpayer has in the applicable tax year purchased or contracted to purchase items of plant, machinery or equipment for the use by the taxpayer within the State of Oregon in the manufacture of malt beverages.

§ 473.040 Additional tax on beverages manufactured out of state. (1) If the laws of another state, territory or nation, or the rules and regulations of any administrative body therein:

(a) Authorize or impose any tax, fee or charge upon the right to transport or import into such state any beer, malt liquor or wine manufactured in this state;

(b) Authorize or impose any different warehousing requirements or higher warehousing fees or inspection fees upon any beer, malt liquor or wine manufactured in this state and imported into or sold in such state, than are imposed upon beer, malt liquor and wine manufactured in such state; or

(c) Impose any higher fee for the privilege of selling or handling beer, malt liquor or wine manufactured in this state than is imposed for the privilege of handling or selling the same kind of beverages manufactured within such state or any other state, the commission shall levy and collect similar taxes, fees and charges from licensees or persons selling in Oregon, beer, malt liquor and wine manufactured in such other state, territory or nation.

(2) The taxes, fees and charges authorized in this section are in addition to the taxes, fees and charges authorized to be assessed and collected by the commission under this chapter.

PENNSYLVANIA

PA. STAT. ANN. tit. 47, § 105 (Purdon 1969)

(b) In the event that any state, territory or country shall impose upon malt or brewed beverages, which have been manufactured in Pennsylvania, a higher tax or fee than is imposed upon malt or brewed beverages manufactured within such state, territory or country, every manufacturer whose malt or brewed beverages manufactured within such state, territory or country are sold to an importing distributor or any person for importation into, and use in, this Commonwealth shall, as to such beverages, pay thereon to this Commonwealth, in addition to the tax imposed by this section, a tax equal to such excess tax or fee which is imposed in such state, territory or country on Pennsylvania-manufactured malt or brewed beverages. . . .

PA. STAT. ANN. tit. 47 (Purdon Supp. 1983-1984)

§ 112.1 Emergency credits

(a) The General Assembly of the Commonwealth of Pennsylvania, conscious of the financial emergency facing the brewing industry in Pennsylvania and the attendant risk of business failure and loss of employment opportunity, declares it public policy that renewal and improvement of the capital facilities of the brewing industry be encouraged and assisted by a limited tax subsidy to be granted during the period of the said emergency.

(b) As used in this act:

"Amounts paid" means (i) amounts actually paid, or (ii) at the taxpayer's election, amounts promised to be paid under firm purchase contracts actually executed during any calendar year falling within the emergency period: provided, however, that there shall be no duplication of "amounts paid" under this definition.

"Emergency period" is the period from January 1, 1974 to December 31, 1985, inclusive.

"Qualifying capital expenditures" means amounts paid by a taxpayer during the emergency period for the purchase of items of plant, machinery or equipment intended for use by the taxpayer within the Commonwealth in the manufacture and sale of malt or brewed beverages: provided, however, that the total amount of qualifying capital expenditures made by the taxpayer within a single calendar year included within the emergency period shall not exceed one hundred thousand dollars ($100,000.00).

. . . .

(c) A tax credit or credits shall be allowed to a taxpayer, as hereinafter provided, not to exceed in total amount the amount of qualifying capital expenditures made by the taxpayer and certified by the secretary.

. . . .

S. 407, Introduced February 24, Session of 1983.

AN ACT

Amending the act of June 9, 1936 (1st Sp. Sess., P.L. 13, No. 4), entitled, as reenacted and amended, "An act imposing an emergency State tax on liquor, as herein defined, sold by the Pennsylvania Liquor Control Board; providing for the collection and payment of such tax; and imposing duties upon the Department of Revenue and the Pennsylvania Liquor Control Board," further providing for taxes.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 2 of the act of June 9, 1936 (1st Sp. Sess., P.L. 13, No. 4), entitled, as reenacted and amended, "An act imposing an emergency State tax on liquor, as herein defined, sold by the Pennsylvania Liquor Control Board; providing for the collection and payment of such tax; and imposing duties upon the Department of Revenue and the Pennsylvania Liquor Control Board," reenacted and amended May 29, 1951 (P.L.

479, No. 112) and amended January 1, 1968 (1967 P.L. 917, No. 413), is amended to read:

Section 2. (a) An emergency State tax is hereby imposed and assessed [at the rate of eighteen per centum of] on the net price of all liquors sold by the board[.] at the following rates:

(i) At twelve per centum for liquors sold by the board for which all the work required to rectify, blend, bottle and ship is done by a plant located in the Commonwealth of Pennsylvania.

(ii) At eighteen per centum on all other liquors sold by the board.

(b) The tax herein imposed shall be collected by the board from the purchasers of the liquor from the board. The amount of such [eighteen per centum] emergency tax so collected by the board, under the provisions of this act, shall be paid into the State Treasury, through the department, in the manner and within the times herein specified, and shall be credited to the General Fund.

Section 2. This act shall apply to tax years commencing on and after January 1, 1983.

Section 4. This act shall take effect immediately.

RHODE ISLAND

R.I. GEN. LAWS (Supp. 1982)

§ 3-10-1. Manufacturing tax rates—Exemption of religious uses.—There shall be assessed and levied by the tax administrator on all beverages manufactured, rectified, blended, or reduced for sale in this state a tax of two dollars ($2.00) on every thirty-one (31) gallons, and a tax at a like rate for any other quantity or fractional part thereof; provided that on any such beverage consisting in whole or in part of wine, whiskey, rum, gin, brandy spirits, ethyl alcohol, or other strong liquors (as distinguished from beer or other brewery products) the tax to be assessed and levied shall be as follows:

still wines (whether fortified or not) . forty cents (40¢) per gallon;
still wines (whether fortified or not) made entirely from fruit grown in this state .... twenty cents (20¢) per gallon;
sparkling wines (whether fortified or not) fifty cents (50¢) per gallon;
cordials less than fifty (50) proof .... one dollar ($1.00) per gallon;
whiskey, rum, gin, cordials, and other beverages consisting in whole or in part of alcohol which is the product of distillation .... two dollars and fifty cents ($2.50 per gallon);
ethyl alcohol to be used for beverage purposes five dollars ($5.00) per gallon;
ethyl alcohol to be used for nonbeverage purposes .. five cents (5¢) per gallon;

.... Provided however a brewer who brews beer in this state, which is actively and directly owned, managed, and operated by an authorized legal entity which has owned, managed, and operated a brewery in this state for at least twelve (12) consecutive months, shall receive a tax exemption on the first one hundred thousand (100,000) barrels of beer that is [sic] produces and distributes in this state in any calendar year. A barrel of beer shall be thirty-one (31) gallons.

R.I. GEN. LAWS (1976)

§ 3-10-15. Retaliatory service charge on imported beverages.—Whenever the law or any order, rule or regulation of any other state of the United States or of any foreign sovereignty having the force of law shall so operate as to expose beverages manufactured in Rhode Island to liability to any tax, assessment, impost or other charge which is intended to give or has in practice the effect of giving any beverage manufactured in the state or sovereignty in question a market advantage over beverages manufactured in Rhode Island and transported to and intended to be sold in said state or sovereignty, then the service charge authorized by § 3-10-16, imposed or to be imposed upon beverages manufactured or exported from said state or sovereignty into the state of Rhode Island shall be in an amount at least equal to the tax, assessment, impost or other charge imposed by such state or sovereignty upon the lik beverages manufactured in Rhode Island and shipped into such state or sovereignty. In case, in the judgment of the department of business regulation, a service charge equal to such tax, assessment, impost or other charge is not sufficient to bring about the removal of the discrimination against beverages manufactured in Rhode Island in favor of beverages manufactured in such state or sovereignty, then said department shall impose such additional service charge or charges as in its judgment will be adequate to that end.]

§ 3-10-16. Reciprocal license and requirements for importation of malt beverages.—Every person, firm or corporation located in another state and engaged in the business of manufacturing or selling malt beverages, who shall transport or cause to be transported malt beverages into this state for sale or consumption in this state, shall pay an annual fee equal in amount to the license or other fees which such other state requires to be paid by a person, firm or corporation located in this state by reason of the transportation of such beverages from this state into such other state or the sale of such beverages to a person, firm, or corporation located in such

other state or otherwise; and shall perform all other duties, including the filing of bonds and certificates of approval, which such other state requires to be performed by a person, firm or corporation located in this state as a condition precedent to the transportation of such beverages from this state into such other state or the sale of such beverages to a person, firm, or corporation located in such other state. . . .

§ 3-10-17. Tax on imported malt beverages.—There is hereby imposed on all malt beverages imported into this state from another state under the provisions of § 3-10-16:

(a) a tax on every thirty-one (31) gallons, which said tax shall be equal to the amount by which the sum of the taxes on such beverages, or on the sale of a like quantity of such beverages, shipped from this state into such other state, imposed by such other state from which such beverages are imported, when added to the service charges imposed by such other state in connection with such shipment into such other state, is in excess of the sum of the taxes imposed by such other state on such beverages, or on the sale of such beverages, manufactured within such other state when added to the service charges imposed by such other state in connection with the sale of such beverages manufactured within such other state; and

(b) a tax at a like rate for any other quantity or for any fractional part thereof.

SOUTH CAROLINA

S.C. CODE ANN. (Law. Co-op. Supp. 1982)

§ 12-21-1010. Definitions.

When used in this article the following words and terms shall have the following meanings:

. . .

(5) The phrase "domestic wine" shall mean wine manufactured wholly within the State primarily from fruits and berries produced within the State;

. . . .

S.C. CODE ANN. (Law. Co-op. 1976)

§ 12-21-1020. Tax on beer and wine containers of one gallon or more.

There shall be levied and collected on all beer offered for sale in containers of one gallon or more in this State a license tax of six-tenths cent per ounce and on all wines offered for sale in this State a license tax of ninety cents per gallon or fractional quantity thereof.

§ 12-21-1030. Tax on sales of less than one gallon and in metric size containers.

If beer be offered for sale in bottles or cans, there shall be levied and collected a tax of six-tenths cents per ounce or fractional quantity thereof, and on wines offered for sale in quantities of less than one gallon there shall be levied and collected a tax of six cents for each eight ounces or fractional quantity thereof, and wine offered for sale in metric sizes a tax at the rate of twenty-five and thirty-five one hundreths cents per liter.

S.C. CODE ANN. (Law. Co-op. Supp. 1982)

§ 12-21-1040. Tax on domestic wine.

Notwithstanding any other provision of law, the tax on domestic wines shall be forty-five cents per gallon if the alcoho-

lic strength of the wine is more than fourteen percent but not more than twenty-one percent and five cents per gallon on such wines if the alcoholic strength is fourteen percent or less. On domestic wine with an alcoholic strength of more than fourteen percent offered for sale in quantities of less than one gallon there shall be levied and collected a tax of three and six-tenths cents for each eight ounces or fractional quantity thereof, and wine offered for sale in metric sizes a tax at the rate of fifteen and twenty-one hundreths cents per liter. On wines offered for sale in quantities of less than one gallon with an alcoholic strength of fourteen percent or less the tax shall be four-tenths of a cent for each eight ounces or fractional quantity thereof and wine offered for sale in metric sizes a tax of one and sixty-nine one hundredths cents per liter . . . .

SOUTH DAKOTA

S.D. Codified Laws Ann. (1977)

§ 35-1-1. Definition of terms. Terms used in this title, unless the context otherwise plainly requires, shall mean:

(1) "Low-point beer," any malt beverage which contains any alcohol whatsoever but not more than three and two-tenths per centum of alcohol by weight;

. . . .

S.D. Codified Laws Ann. (Supp. 1982)

§ 35-5-3. Amount of tax based on quantities. The occupational tax based on the quantities of different kinds of alcoholic beverage is:

. . .

(5) Low-point beer, five dollars per barrel of thirty-one gallons, or a prorata portion thereof in accordance with the size of the bulk container;

. . . .

S.D. Codified Laws Ann. (1977)

§ 35-5-3.1. Reduced tax on low-point beer manufactured in state. Any low-point beer brewed or manufactured in this state and sold by a manufacturer shall be exempt from one-half the tax levied under the provisions of this chapter.

TENNESSEE

TENN. CODE ANN. (1980)

§ 57-3-207. Grape and wine law—Winery license—Fee—Home wineries—Tax on Tennessee wine—Wine production information.—

. . . .

(e) Upon wine produced in Tennessee from fruits, berries, or vegetables grown in Tennessee, there is levied a tax of five cents (5¢) per gallon . . . Such wine from Tennessee products shall be exempt from all other alcoholic beverage taxes and fees, including those imposed by §§ 57-3-302 and 57-4-301(c).

§ 57-3-302. Tax upon distribution or sale—Exemptions.— (a) There is levied upon the sale or distribution by sale or gift a tax of one dollar and ten cents ($1.10) on each gallon of wine, and a like or proportional rate per gallon on wine sold or distributed in any other container of more or less than one (1) gallon . . . The tax imposed on wine herein shall not apply to wines taxed under § 57-3-207, as amended.

. . . .

§ 57-4-301. Privilege taxes—Tax on retail sales—Carrier license fees.—

. . . .

(c) In addition to the privilege taxes levied in (b)(1) above, there is further levied a tax equal to the rate of fifteen percent (15%) of the sales price of all alcoholic beverages sold for consumption on the premises, said tax to be computed on the gross sales of alcoholic beverages for consumption on the premises for the purpose of remitting the tax due the state, and to include each and every retail thereof.

. . . .

TEXAS

TEX. ALCO. BEV. CODE ANN. (Vernon 1978)

§ 203.01. Tax on Beer

A tax is imposed on the first sale of beer manufactured in this state or on the importation of beer into this state at the rate of five dollars per barrel.

§ 203.08. Tax Exemption for Certain Manufacturers

A manufacturer whose annual production of beer in this state does not exceed 75,000 barrels is exempt from the payment of 25 percent of the tax imposed under Section 203.01 of this code on each barrel of beer manufactured in this state.

VIRGINIA

VA. CODE (1983)

§ 4-22.1. Tax on wine and other alcoholic beverages; collection, computation, and distribution of taxes; exceptions; refunds and adjustments. —A. Except as provided in § 4-25.1 D there is hereby levied a tax of forty cents on each liter of wine sold in Virginia. Additionally, on wine sold to persons other than licensees, the state tax shall be four percent of the price charged.

. . . .

§ 4-25.1. Farm wineries; licenses granted by Commission; tax.—A. The Commission may grant farm winery licenses, which shall authorize the licensees to manufacture wine containing fourteen per centum or less of alcohol by volume and to sell, deliver or ship such wine, in accordance with regulations of the Commission, in barrels, bottles or other closed containers, to the Commission, to persons licensed under the provisions of this chapter to sell the wine so manufactured at wholesale or retail for the purpose of resale . . . or to persons outside of Virginia. . . .

B. No more than twenty-five per centum of the fruits, fruit juices or other agricultural products used by the owner or lessee of a farm winery shall be grown or produced outside this State. However, upon petition by the Department of Agriculture and Consumer Services, the Commission is authorized to permit the use of a greater quantity of out-of-state products if supplies grown or produced in this State are insufficient for a person holding a farm winery license to achieve the level of production which otherwise could be anticipated during a given license year.

. . . .

D. No state alcoholic beverage tax shall be levied upon wine manufactured under a farm winery license.

WASHINGTON

WASH. REV. CODE ANN. (Supp. 1983-1984)

§ 66.04.010. Definitions.

In this title, unless the context otherwise requires:

. . . .

(33) "Domestic winery" means a place where wines are manufactured or produced within the State of Washington.

. . . .

(36) "Wine wholesaler" means a person who buys wine from a vintner or winery located either within or beyond the boundaries of the state for the purpose of selling the same not in violation of this title, or who represents such vintner or winery as agent.

§ 66.24.170 Domestic winery license—Fee—Report—Wine wholesaler's and retailer's licenses included

(1) There shall be a license to domestic wineries; fee to be computed only on the liters manufactured: One hundred thousand liters or less per year, one hundred dollars per year; over one hundred thousand liters to seven hundred fifty thousand liters per year, four hundred dollars per year; and over seven hundred fifty thousand liters per year, eight hundred dollars per year.

. . . .

(3) Any domestic winery licensed under this section shall also be considered as holding for the purposes of selling wines of its own production, a current wine wholesaler's license under RCW 66.24.200 and a wine retailer's license, class F, under RCW 66.24.370 without further application or fee. Any winery operating as a wholesaler or retailer under this subsection shall comply with the applicable laws and rules relating to such wholesalers and retailers.

LIQ. CONT. L. SERV. (CCH) Washington

[¶ 7397]

§ 66.24.210 [Tax on wines sold to retail licensees]—Imposition and collection of tax—Report—Penalty. (1) There is hereby imposed upon all wines sold to wine wholesalers and the Washington state liquor control board, within the state a tax at the rate of twenty and one-fourth cents per liter . . . .

[¶ 7398]

(2) An additional tax is imposed equal to the rate specified in RCW 82.02.030 [seven percent] multiplied by the tax payable under subsection (1) of this section. . . .

WISCONSIN

WISC. STAT. ANN. (West Supp. 1982-1983)

§ 139.03 Liquor tax

An occupational tax is imposed upon the selling of intoxicating liquor as follows:

(2m) The rate of such tax is * * * $3.25 per wine gallon on intoxicating liquor, except wine containing not in excess of 21% of alcohol by volume and intoxicating liquor taxed under sub. (2t) or (2w), containing 0.5% or more of alcohol by volume, and is computed in accordance with the following tables, using whichever table produces the least amount of tax: [See Figures 139.03(2m)(a) and (b) following]

Figure 139.03(2m)(a)

Quantity in Wine Gallons	Quantity in Ounces	Tax when alcoholic content is ½% or more by volume
Up to and including 1/64 of a gallon	Up to and including 2	* * * $ .05075
More than 1/64 of a gallon to and including 1/32 of a gallon	More than 2 to and including 4	* * * .1015
More than 1/32 gallon to and including 1/16 of a gallon	More than 4 to and including 8	* * * .203
More than 1/16 gallon and including 1/10 gallon	More than 8 to and including 12.8	* * * .325
More than 1/10 gallon to and including 1 pint	More than 12.8 to and including 16	* * * .406
More than 1 pint to and including 1/5 gallon	More than 16 to and including 25.6	* * * .65
More than 1/5 gallon to and including 1 quart	More than 25.6 to and including 32	* * * .8125
More than 1 quart to and including 1/2 gallon	More than 32 to and including 64	* * * 1.625
More than 1/2 gallon to and including 1 gallon	More than 64 to and including 128	* * * 3.25

Figure 130.03(2m)(b) Quantity in liters		Tax when alcoholic content is ½% or more by volume
50	milliliters	* * *
		$ .04293
200	milliliters	* * *
		.17172
500	milliliters	* * *
		.4293
750	milliliters	* * *
		.64396
1	liter	* * *
		.8586
1.75	liters	* * *
		1.50255

Deletions are indicated by asterisks * * *

. . . .

Act of July 1, 1983, Act 27, 1983 New Laws Page 45

SECTION 1494m. 139.03(2t) of the statutes is amended to read: 139.03 (2t) The rate of tax, effective on ~~June 1, 1982,~~ the first day of the 2nd month beginning after publication of this act (1983), and thereafter, is ~~$1~~ $1.65 per wine gallon on intoxicating liquor, containing 0.5% or more of alcohol by volume, manufactured or distilled in this state ~~by pollution control facilities as defined in s. 66.521(2)(h) or~~ from whey which is produced in this state~~, except that beginning with June 1, 1982, alcohol manufactured or distilled in this state by pollution control facilities as defined under s. 66.521(2)(h) from brewing wastes that are produced in this state is not subject to the tax under this subsection.~~ The tax shall be computed in accordance with the following table and the department of revenue shall calculate the equivalent rates for metric containers: [See Figure 139.03(2t) following]

Figure: 139.03 (2t)

Quantity in Wine Gallons	Quantity in Ounces	Tax
Up to and including 1/64 of a gallon	Up to and including 2	$ ~~.015625~~ $ .025781
More than 1/64 of a gallon to and including 1/32 of a gallon	More than 2 to and including 4	~~.03125~~ .051563
More than 1/32 gallon to and including 1/16 of a gallon	More than 4 to and including 8	~~.0625~~ .103125
More than 1/16 gallon to and incuding 1/10 gallon	More than 8 to and including 12.8	~~.10~~ .165
More than 1/10 gallon to and including 1 pint	More than 12.8 to and including 16	~~.125~~ .20625
More than 1 pint to and including 1/5 gallon	More than 16 to and including 25.6	~~.20~~ .33
More than 1/5 gallon to and including 1 quart	More than 25.6 to and including 32	~~.25~~ .4125
More than 1 quart to and including 1/2 gallon	More than 32 to and including 64	~~.50~~ .825
More than 1/2 gallon to and including 1 gallon	More than 64 to and including 128	~~1.00~~ 1.65

(2w) The rate of tax, effective from June 1, 1982, to May 31, 1983, is $2.25 per wine gallon on intoxicating liquor containing 0.5% or more of alcohol by volume manufactured or distilled in this state from brewing wastes that are produced in this state. The tax shall be computed in accordance with the following tables, using whichever table produces the least amount of tax, except that the rate of tax effective on June 1, 1983, shall be computed in accordance with s. 139.03(2m)(a) (figure) and (b) (figure): [See Figures 139.03(2w)(a) and (b) following]

Figure: 139.0(2w)(a)

Quantity in Wine Gallons	Quantity in Ounces	Tax when alcoholic content is ½% or more by volume
Up to and including 1/64 of a gallon	Up to and including 2	$ .035156
More than 1/64 of a gallon to and including 1/32 of a gallon	More than 2 to and including 4	.070312
More than 1/32 gallon to and including 1/16 of a gallon	More than 4 to and including 8	.140624
More than 1/16 gallon to and including 1/10 gallon	More than 8 to and including 12.8	.225
More than 1/10 gallon to and including 1 pint	More than 12.8 to and including 16	.281248
More than 1 pint to and including 1/5 gallon	More than 16 to and including 25.6	.45
More than 1/5 gallon to and including 1 quart	More than 25.6 to and including 32	.562496
More than 1 quart to and including 1/2 gallon	More than 32 to and including 64	1.125
More than 1/2 gallon to and including 1 gallon	More than 64 to and including 128	2.25

Figure: 139.03(2w)(b)

Quantity in Liters		Tax when alcoholic content is ½% or more by volume
50	milliliters	$ .029726
200	milliliters	.1189
500	milliliters	.29726
750	milliliters	.44589
1	liter	.59452
1.75	liters	1.0404

No. 82-1565

In The

Supreme Court of the United States

October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,

Appellants,

v.

GEORGE FREITAS, DIRECTOR OF TAXATION
STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION[1]

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agen-

[1]This brief is submitted by the Multistate Tax Commission in support of the Appellee. The parties have consented to the filing of this brief and a letter so indicating has been filed with the Clerk of the Court.

cy of the Multistate Tax Compact entered into currently by 20 states and the District of Columbia as full members and by 10 states as associate members.[2]

The Commission and its member states are concerned with the position of the Appellants and their *amicus*, Distilled Spirits Counsel of the United States and the Wine Institute, that the Court should declare unconstitutional the Hawaii Liquor Tax Law (Hawaii Rev. Stat. § 244) in *total* and refund a vast amount of liquor taxes to Appellants and other wholesalers which they have passed on to their purchasers. They are likewise concerned with the argument that any exemption from taxation to encourage the development of local industry, is invalid *per se* because of *presumed* (not proven) impact of such exemptions on interstate or foreign commerce.

The Appellants confuse the legitimate interest of the states to promote a local industry—a permissible state purpose—with a purpose to burden interstate or foreign commerce by imposing discriminatory taxation on such commerce. The Commission and its member states believe that such argument ignores the broad powers given the states under the Twenty-first Amendment to regulate and control liquor traffic and use within their respective borders. Most of the states, in conformity with prior Twenty-first Amendment decisions of the Court, enacted

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[2]The constitutionality of the Compact was upheld by the United States Supreme Court in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), *aff'g* 417 F. Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer." *Id.* at 456.

liquor legislation which is inconsistent with the position advanced here by Appellants and their *amici*.

Appellants and their *amici* ignore the facts and circumstances of this case. They claim discrimination as a matter of constitutional law by application of the protectionist *per se* rule without any showing that there is discrimination as a matter of fact. While the promotion of a small segment of a local liquor industry by granting a temporary tax subsidy could be characterized as protectionist legislation, it is not *per se* invalid since neither its purpose nor effect is to discriminate against competing out-of-state products or businesses. Furthermore, the liquor tax was not imposed because of the out-of-state origin of the liquor. The Hawaii Liquor Tax Law makes no such distinction. We thus do not believe that Appellants can rely on the protectionist *per se* rule to escape the factual realities of this case. As indicated in the Brief of the Appellee, the Appellants have not shown any damages to them, the liquor industry, or interstate or foreign commerce by the presence of the exemptions of okolehao and pineapple wine in the Liquor Tax Law for a limited time. Neither have they shown that they have shouldered the economic burden of the liquor excise tax.

The Court should grant the relief prayed for by Appellee in its brief. If the Court considers the merits of this case, it should affirm the opinion of the Hawaii Supreme Court. In its opinion, the Hawaii Supreme Court found that the tax in question was valid because the exemptions in question were enacted by the Hawaii legislature to serve a legitimate state interest and Appel-

lants had not shown that the exemptions adversely impacted their businesses or interstate or foreign commerce.

This brief is filed in support of that opinion and the position of the Appellee as set forth in his Brief.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court held that the exemptions in question were valid under the Equal Protection, Import-Export and Commerce Clause provisions of the United States Constitution.[3]

In its equal protection analysis, by reliance on prior decisions of this Court (Jur. Stmt., App. A at A-7-16) the Hawaii Supreme Court found that the exemptions were granted for a legitimate legislative purpose (*Id.* at A-16). Since the products in question were exempted to promote a local industry and not to erect any trade barriers, it is evident that the exemptions were for a legitimate local purpose. In addition, the Hawaii Supreme Court found that the Hawaii Liquor Tax applied equally to all persons (wholesalers) in the same class as Appellants (*Id.* at A-11). While Appellants challenge this conclusion by arguing that this case involves *product*

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[3]The Hawaii Supreme Court did not consider whether the Appellants were entitled to the refund of liquor taxes paid, whether they had standing, whether the exemptions were severable from the rest of the Liquor Excise Tax, or whether any decision on the merits, if favorable to the Appellants, should be given only prospective application. As indicated in the Brief of the Appellee, these issues require resolution for proper disposition of this case.

discrimination (Appellants' Brief at 23-24), they have failed to allege or prove that okolehao or pineapple wine, *as products,* compete with any imported products whatsoever and particularly with their own imported products (beer and grape wine). Inasmuch as the products in question were not favored over competing out-of-state products of like kind, their exemption could have no discriminatory effect on either interstate or foreign commerce. The exemptions in question would have had the same practical operation and effect if the Hawaii legislature had simply exempted from the excise tax *all* okolehao or pineapple wine, wherever manufactured or produced. Thus the equal protection analysis and conclusions of the Hawaii Supreme Court are valid in every respect. This conclusion is further amplified and supported by the Brief of the Appellee.

The Hawaii Supreme Court correctly disposed of the Import-Export question raised by Appellants. The tax in question is clearly an excise tax on the sale of liquor. It is not an import duty; nor is it a tax on importation into Hawaii. The tax attaches only when liquor enters into the local market for sale, use, or consumption. The tax does not attach to liquor destined for delivery or consumption elsewhere. The tax does not discriminate against imported goods either by design or actual effect (*Id.* at A-21).

With respect to the Commerce Clause, the Hawaii Supreme Court considered the practical effect of the challenged Liquor Excise Tax Law in light of the standards set forth by this Court in ***Complete Auto Transit v. Brady,*** **430 U.S. 274 (1977) (*Id.* at A-21-30).** In ***Complete Auto,*** this Court held that a state tax does not

offend the Commerce Clause if it is applied to an activity with a substantial nexus within the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State (430 U.S. at 279; *id.* at A-23). Of these tests, the only one seriously relied on by Appellants and meriting any attention is the test pertaining to discrimination. As to the discrimination issue, the Hawaii Supreme Court, after analyzing the cases relied upon by Appellants, concluded "that the Appellants had failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce." (*Id.* at A-30.) In support of this statement it noted in footnote 21:

> Though the taxpayer submitted no evidence on the amount of okolehao and pineapple wine sold in Hawaii, we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii.

Id. at A-39.

Appellants do not challenge this conclusion, but rather argue that the entire Hawaii Liquor Tax is unconstitutional because two limited exemptions constitute protectionist *per se* legislation forbidden by the Commerce Clause. Appellants fail to understand the vast difference between (1) a statutory scheme to promote the development of a local industry which is nonexistent or is having financial difficulties by granting it a limited tax exemp-

tion, and (2) a statutory scheme designed to impose discriminatory taxes on interstate or foreign commerce.[4]

Appellants cite *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) and other similar cases which involve state taxes which discriminated against interstate commerce, whereas this case involves nondiscriminatory tax exemptions of unique local industries.

The Hawaii Supreme Court properly disposed of the Appellants' Equal Protection, Import-Export and Commerce Clause arguments. Its reasoning is based on the fact that the limited exemptions in question do not constitute protectionist *per se* legislation and do not burden or discriminate against interstate or foreign commerce.

ARGUMENT

I. Introduction to Argument.

This Brief is confined to the substantive merits of the case. We agree, however, with the Appellee's position that Appellants should not be unjustly enriched by the refund of any taxes in question; being entitled to

[4]Interestingly here, the persons sought to be protected by the Appellants are not the Appellants. Rather, it is the out-of-state producers of liquor which Appellants assume are disadvantaged by the exemption of okolehao and pineapple wine production in Hawaii. The record does not disclose the existence of any such producers. If it did, the Appellants cannot raise any discrimination or other issues pertaining to the legal rights of these producers.

no refund, there exists no case or controversy for adjudication by this Court. The Stipulation of Facts of Bacchus Imports, Ltd., Appellant, states:[5]

> 11. Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage markup to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:
>
> (1) Inland freight to the port of shipment to Honolulu;
>
> (2) Container and wharfage charges at the port of loading, as charged by the shipping company;
>
> (3) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);
>
> (4) Wharfage fees at Honolulu;
>
> (5) Drayage charges for transportation to plaintiff's warehouse;
>
> (6) Customs brokerage fees;
>
> (7) Customs duties and internal revenue taxes as applicable; and
>
> (8) Warehouse handling charges.
>
> 12. Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty per cent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half per cent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.
>
> 13. Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the

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[5]The Stipulation of Facts of Appellant, Eagle Distributors, Inc. is identical in substance.

> Liquor Tax Law to file its return and remit the twenty per cent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

(*Id.* at 8-9).

These stipulations, coupled with Hawaii Rev. Stat. § 281-83, clearly demonstrate that the Appellants are neither entitled to a refund of taxes nor to adjudication of the constitutional issues which they seek to raise in this case.[6] This follows from the fact that Appellants have separately stated and passed the tax on to their purchasers (liquor retailers).

We also agree with the position of the Appellee that any decision invalidating discriminatory features of state regulation or taxation of the liquor industry or traffic, should be given only prospective application by this Court. Contrary to the Appellants' argument, as of this date, no decision of this Court has specifically invalidated all discrimination in this area. Rather, the Court has recognized that states have constitutional au-

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[6] 84 C.J.S., Taxation, § 632; *State ex rel. Old Line Life Ins. Co. v. Olsness,* 63 N.D. 695, 249 N.W. 694 (1933); *Washington Plaza Associates v. State Bd. of Assessments Appeals,* 620 P. 2d 53 (Colo. App. 1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson,* 286 So. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue,* 50 Ill. App. 3d 161, 365 N. E. 2d 574 (1977); *Consolidated Distilled Products Inc. v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed,* 419 U. S. 809 (1974); *United States v. Jefferson Electric Manufacturing Co.,* 291 U. S. 386 (1934); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U. S. 464 (1982).

thority under the Twenty-first Amendment to regulate and tax liquor in a manner not permitted by other constitutional restraints applicable to other items of commerce.

II. There is No Merit to the Appellants' Equal Protection Argument Because Hawaii is Entitled to Classify Liquor Products Differently for Taxation Purposes and All Persons in Appellants' Class Have Been Treated Alike.

The Equal Protection issue is properly analyzed in the Opinion of the Court below (Jur. Stmt., App. A-6-16). The only possible basis for the Appellants to contend that the exemption of okolehao and pineapple wine deny them equal protection would be that they are discriminated against as wholesalers because they are licensed to sell products that are taxed at a discriminatory rate as compared to products other wholesale licensees are selling. There is nothing to indicate that these are the facts of this case. The fact that the Hawaii legislature exempted okolehao and pineapple wine from the Liquor Excise Tax law does not support the conclusion that the law discriminates against the Appellants. Yet, that is the sole basis on which Appellants base their discrimination argument.

III. There is No Merit to the Appellants' Import-Export Clause Argument Because the Liquor Excise Tax Is On a Local Incident (Sale) After Importation and the Liquor Tax Does Not Discriminate Against Foreign Commerce.

In advancing their Import-Export as well as foreign commerce argument (Appellants' Brief 21-29), the Appellants inappropriately assume that the Hawaii Liquor

Tax is based on "taxing imports on the basis of their origin" (*Id.* at 24). However, the Hawaii Supreme Court noted as follows:

> Hawaii's tax on wholesaling activity applies to all liquor wholesalers engaged in business in the States. It touches all local sales and uses of liquor produced in foreign countries, in the mainland States, and in Hawaii, with the exception of okolehao and pineapple wine. There is absoluutely no indication that it has been applied selectively to discourage imports in a manner consistent with foreign policy. Nor is there a scintilla of evidence that it has the effect of a protective tariff *or that it has any substantial indirect effect on the demand for imported liquor.* And no reason whatsoever to consider the limited exemption a threat to the federal treasury appears. . . .

Jur. Stmt., App. A-21 (emphasis added; footnotes omitted).

As further noted by the Hawaii Supreme Court:

> The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056. No one could quarrel with the proposition that the promotion of domestic industry is a legitimate state purpose.

Id. at A-12-13 (footnote omitted).

As the foregoing extracts from the Hawaii Supreme Court's Opinion indicate, the Hawaii Liquor Tax is not imposed on liquor because of its foreign origin. The

liquor tax applies to all sales in Hawaii regardless of their origin with the exception of two unique products which amount to a very small fraction of total sales irrespective of their origin. In the year 1976 (the year the exemptions were enacted), the exempted products amounted to only 3.7 per cent of total liquor produced in Hawaii. Appellants' Import-Export and Foreign Commerce Clause argument would have some validity only if they imported okolehao or pineapple wine, which was subject to discriminatory taxes. On the record, and to our knowledge, no such products are produced elsewhere, and therefore, none could have been the subject matter of discrimination. As noted by the Hawaii Supreme Court in its Opinion: "We . . . have good reason to believe neither okolehao [nor] pineapple wine is produced elsewhere." Jur. Stmt. at A-39.[7]

The Hawaii Liquor Tax Law was first enacted in 1939 to regulate, control, and tax the liquor industry in Hawaii. The Committee Report there noted:

> Your Committee, after studying the problem of the effects of liquor in relation to the cost to government, feels that the cost of government is materially increased due to liquor, and that the establishment of a liquor tax is fair and equitable. Statistics bear out the fact that the costs of police, institutions and some other branches of the government have been greatly increased due to liquor. Your Committee feels that the revenues from a liq-

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[7]In cases relied upon by the Appellants such as *Cook v. Pennsylvania,* 97 U. S. 566 (1878); *Welton v. Missouri,* 91 U. S. 275 (1878); and *Brown v. Maryland,* 25 U. S. 12 (Wheat.) 419 (1827) goods were in fact subject to discriminatory taxation because of their foreign origin. The Hawaii Liquor Tax makes no such distinction.

uor tax should be divided between the Territory and the counties inasmuch as the increased costs of government due to liquor accrue to the counties as well as the Territory.

1939 Hawaii H.J. at 1023.

Based on the foregoing, it is totally unreasonable to conclude that the tax in question is imposed on imported liquors "because of their foreign origin." Rather, the tax is imposed as a general revenue measure on all liquor sold in Hawaii. The exemption of two unique Hawaiian products does not change the true nature of the Hawaii Liquor Tax Law one *iota*. It is still a general revenue law.

IV. There is No Merit to the Appellants' Commerce Clause Argument Because the Practical Operation and Effect of the Exemptions In Question Does Not Result In Any Discrimination Against Either Interstate or Foreign Commerce.

In *Arkansas Elec. Co-op. Corp. v. Arkansas Public Comm'n*, — U.S. — 103 S. Ct. 1905 (1983), this Court noted:

> ". . . [T]he general trend of our modern Commerce Clause jurisprudence [is] to look in every case to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.' 314 U.S., at 505. ". . . But in any event it [modern jurisprudence in regard to the Commerce Clause] clearly recognizes . . . that there is 'an infinite variety of cases, in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconcilation of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and the national interests involved.'

Southern Pac. Co. v. Arizona ex rel Sullivan, 325 U.S. 761, 768-69 . . . (1945). 103 S. Ct. at 1915. ". . . Thus, in recent years, this Court has explicitly abandoned a series of formalistic distinctions . . . which once both defined and controlled various corners of the Commerce Clause doctrine."

Id. at 1916.

In *United States Brewers Assoc., Inc. v. Healy*, 532 Fed. Supp. 1312 (1982), the Brewers Association challenged the constitutionality of Connecticut statute which required that brewers sell to Connecticut wholesalers at the lowest price the same item sold in a four state region. In rejecting the discriminatory purpose argument of the brewers, the Court noted:

> As mentioned above, there are no brewers or importers in Connecticut, so the statute could not possibly benefit local brewers. The statute mandates only that Connecticut wholesalers be treated as well as out-of-state wholesalers with respect to price. The legislative intent to secure "fairer" or "more equal" competition can hardly be characterized as "protectionist within the meaning of the Commerce Clause." Because neither the statute nor the legislative debates reveal an avowed purpose to discriminate against out-of-state businesses, the statute cannot be invalidated on the basis of its purpose alone.

532 Fed. Supp. 1312 at 1323.

We believe that footnote 42 (*id.*) of *Brewers* appropriately articulates the nature of the protectionist *per se* rule:

> While the Supreme Court has indicated that "economic protectionism" may be shown by "proof of either discriminatory effect, see *Philadelphia v. New Jersey*, 437 U.S. 617 [98 S.Ct. 2531, 57 L.Ed. 2d 475] (1978) or of discriminatory purpose, see *Hunt*

v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352-353 [97 S. Ct. 2434, 2446-2447, 53 L.Ed. 2d 383] (1977)," *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 727 n. 15, 66 L.Ed. 659, it is hard to find a case where purpose alone has invalidated a statute. The citation to *Hunt v. Washington Apple* in support of the proposition that discriminatory purpose *alone* is sufficient for a finding that a state law is "protectionist" appears to be incorrect. In *Hunt*, the Court stated that

> we need not ascribe an economic protection motive to the North Carolina legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the market place.

Id. 432 U.S. at 352-53, 97 S.Ct. at 2446. It is reasonably clear from this quotation that *Hunt* did not involve a finding of discriminatory *purpose*, but rather rested on the existence of a discriminatory *effect*. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 351-52, 97 S.Ct., at 2445-2446. As the Court has recognized, it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951). Because states almost always can justify a particular statute, the Court, when considering the *purpose* of a challenged statute, will not be bound by " '[t]he name, description or characterization given it by the legislature or the Courts of the State,' but will determine for itself the practical *impact* of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed. 2d 250 (1979) (emphasis added), quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550, 44 S.Ct. 186, 188, 68 L.Ed. 437 (1924). Invariably the Court infers discriminatory *purpose* only when there is a

prior finding of discriminatory *impact*. The inquiry in each case requires first, a determination of whether a discriminatory effect exists, and second, an evaluation of the declared state purpose in light of the means chosen to attain it. Only where the discriminatory effect appears to stem primarily from a design to protect local interests and only secondarily from the pursuit of a legitimate state goal, has the Court inferred a "protectionist" purpose. The Court has rarely, if ever, invalidated a statute on the basis of a discriminatory purpose where there was not proof of actual or inevitable discriminatory effects. While the Court would be entitled to invalidate a statute with the avowed purpose of discriminating against interstate commerce on the assumption that it will have the desired effect, the opportunity rarely presents itself. As noted above, states are rarely so bold as to announce their intention to violate the Constitution, and the instant case is no exception to the rule.

Here the exemptions have neither discriminatory purpose or effect on interstate or foreign commerce. In addition, they have no known or measurable impact on interstate or foreign commerce. The only ascertainable purpose, effect or impact relates solely to promotion of a unique Hawaiian liquor industry.

Even though the protectionist *per se* rule is inapplicable here,[8] consideration of actual discrimination is still relevant. In arguing the *per se* rule and discrimination under the Commerce Clause, Appellants not only fail to

[8]The Court has referred to the protectionist *per se* rule as "a virtually *per se* rule of invalidity." *Lewis v. BT Investments, Inc.*, 447 U. S. 27, 36 (1980). Appellants have dropped the word "virtually." Yet, the word virtually is important as an indication that facial discrimination must be examined in light of its purpose and its effect on interstate or foreign commerce.

note the absence of any discriminatory purpose or effect of the exemptions in question, but also the fact that there is no discriminatory taxation of products manufactured in another state. There is a substantial difference between the Hawaii Liquor Tax and discriminatory taxes involved in the cases relied upon by Appellants, such as *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977) and *G.A.F. Seelig v. Baldwin,* 293 U.S. 163 (1934). In these cases the taxing scheme was specifically designed *to promote local businesses at the expense of competing out-of-state businesses.* This effect, purpose, and impact is lacking here. It is invalid to assume that commerce is burdened because the exemptions in question were enacted to promote unique local liquor industry. In any event, as noted in *Boston Stock Exchange,* "... [the] Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case." 429 U.S. at 329. As noted in *Seagram & Sons, Inc. v. Hostetter,* 384 U. S. 35 (1966), in commenting on Section 9, the price affirmation provision of a New York statute, it noted:

> "The serious discriminatory effects of Section 9 alleged by Appellants on their business outside New York are largely matters of conjecture ... It will be time enough to assess the alleged extraterritorial effects of Section 9 when a case arises that clearly presents them."

384 U.S. 35 at 43.

We have no proof here of discriminatory effects as pertains to the exemptions in question and Appellants do not allege any. Discriminatory effects cannot be inferred here under the protectionist *per se* rule or otherwise. The liquor tax was not imposed and the exemptions were

not enacted to block or discriminate against the importation of liquor into Hawaii. Therefore, any Commerce Clause issue must go to the discriminatory effect. Since there is none, the Commerce Clause provision of the United States Constitution is not violated. This conclusion is substantiated by the Commerce Clause argument in the Appellee's Brief and the analysis of the same in the Opinion of the Hawaii Supreme Court.

V. Appellants' Argument That the Twenty-first Amendment is Neither Relevant Nor Controlling Here, Lacks Substance and Undercuts Their Commerce Clause and Import-Export Clause Arguments.

As noted by the Court in *Seagrams*:

> Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that:
>
> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court has consistently held, "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries,* 324 U.S. Cf. *Nippert v. City of Richmond,* 327 U.S. 416, 425, n. 15, 66 S.Ct. 586, 590, 90 L.Ed. 760. Just two Terms ago we took occasion to reiterate that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." ***Hostetter v. Idlewild Bon Voyage Liquor Corp.,*** 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed. 2d 350. See ***State Board of Equalization of California v. Young's Market Co.,*** 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 1424; ***Ziffrin, Inc. v. Reeves,***

308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; *State of California v. State of Washington,* 358 U.S. 64, 79 S.Ct. 116, 3 L.Ed. 2d 106. Cf. *Indianapolis Brewing Co. v. Liquor Control Comm.,* 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246. As the *Idlewild* case made clear, however, the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor. In *Idlewild* the ultimate delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulation of commerce with foreign nations. Cf. *Dept. of Alcoholic Beverage Control for State of Cal. v. Ammex Warehouse Co.,* 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed. 2d 743; *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

> [3] Unlike *Idlewild,* the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032. No such situation is presented in this case. . . .

384 U.S. 35 at 41-43.

Seagrams and cases cited therein at least require the interest of Hawaii in enacting the exemptions to be viewed in light of their practical operation and effect on interstate or foreign commerce. When this is done, the protectionist *per se* rule (if otherwise applicable here)

is not controlling. The fact that the exemptions have no known impact or effect on interstate or foreign commerce is controlling.

CONCLUSION

The Commission and its member states, respectfully submit that this Court grant the relief requested by the Appellee in its Brief. It would be incongruous indeed if Appellants, in light of the Twenty-first Amendment, as heretofore interpreted and applied by this Court, on the basis of a protectionist *per se* rule, could obtain over $100 million dollars in refunds of liquor excise taxes where there is nothing in the record to show any injury to them or burden on interstate or foreign commerce.

Respectfully submitted,

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Multistate Tax Commission

No. 82-1565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., *et al.*,
Appellants,
v.
GEORGE FREITAS,
Director of Taxation of the State of Hawaii, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Hawaii

BRIEF OF AMICUS CURIAE THE WINE INSTITUTE
IN SUPPORT OF REVERSAL

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September 1, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF OF AMICUS CURIAE THE WINE INSTITUTE

INTEREST OF AMICUS CURIAE

The Wine Institute is a voluntary nonprofit trade association, organized under the laws of the State of California. It includes among its 467 members approximately 90 percent of the licensed wineries in California. Its members ship wines to customers throughout the country. The Institute and its members have a vital interest in preserving the free flow of interstate commerce in wine and wine products.[1]

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[1] This brief amicus curiae is filed in support of appellants, Bacchus Imports, Ltd. and Eagle Distributors, Inc., and of appellee Foremost-McKesson, Inc. It is accompanied by the written consents of the parties.

SUMMARY OF ARGUMENT

Hawaii Revised Statutes § 244-4 (Supp. 1982) subjects alcoholic beverages sold or used within Hawaii to a 20-percent tax based on the wholesale price of the liquor. In order to promote the state liquor industry, the Hawaiian legislature specifically exempted Hawaiian-made wine and okolehao (a type of brandy) from this tax, while leaving non-Hawaiian products subject to taxation. Appellants Bacchus Imports, Ltd. and Eagle Distributors, Inc. and appellee Foremost-McKesson, Inc. challenged the constitutionality of the tax under the U.S. Constitution in the Hawaii Tax Appeal Court. The Tax Appeal Court upheld the tax, and the Supreme Court of Hawaii affirmed. This appeal followed.

The Hawaii Supreme Court's decision should be reversed. On its face, the Hawaii liquor tax discriminates against out-of-state goods. Moreover, the Hawaii Supreme Court has affirmed that the state's goal in creating the discrimination was to promote local industry. That may be a valid goal for some purposes. But under the Commerce Clause of the U.S. Constitution state taxes that discriminate against out-of-state goods to promote local businesses have long been found *per se* unconstitutional. This principle, which the Court has consistently affirmed over the past 100 years, reflects the basic free-trade purpose of the Commerce Clause.

The Twenty-first Amendment does not alter this conclusion. To be sure, Section 2 of that Amendment empowers the states to prohibit the importation and transportation of liquor within their borders in order to combat evils thought to be associated with liquor and the liquor trade. But this Court has held that the states remain subject to other applicable constitutional provisions even when a state liquor regulation is intended to serve the purposes of the Twenty-first Amendment. If such a regulation clashes with interests protected by other con-

stitutional provisions, including the Commerce Clause, the competing constitutional interests must be balanced. In this case, the only interest asserted by the state—promotion of its local liquor industry—is unrelated to the purposes of the Twenty-first Amendment. Accordingly, the state's interest derives no constitutional support from the Amendment, and the Amendment cannot save the statute from being declared unconstitutional under the Commerce Clause.

ARGUMENT

I. The Hawaii Liquor Tax Violates the Commerce Clause Because It Discriminates Against Wines Produced Outside the State.

This case poses a simple and straightforward issue: may a state tax out-of-state goods discriminatorily to promote local business interests? The Supreme Court has consistently held that such taxes are flatly inconsistent with the Commerce Clause of the U.S. Constitution.

In the case before the Court, the relevant facts are undisputed. As the Hawaii Supreme Court noted, the Hawaii liquor tax "imposes a levy on the sale or use of alcoholic beverages amounting to twenty percent of the wholesale price of the liquor sold or used . . . ." Appendix to Jurisdictional Statement at A-4 (hereinafter "App."). In 1976, the Hawaii legislature added an exemption for transactions involving Hawaiian-made fruit wines, but it left sales of non-Hawaiian wines subject to taxation at the 20-percent rate.[2] After reviewing the legislative his-

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[2] App. at A-34 n.8. The exemption applied to "[a]ny fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981 . . . ." Hawaii Rev. Stat. § 244-4(7) (Supp. 1982). In 1976, the legislature also extended an existing exemption from the tax for Hawaiian-made okolehao (a brandy produced from roots of the Hawaiian ti plant). Hawaii Rev. Stat. § 244-4(6) (Supp. 1982). The Supreme Court of Hawaii found that the legislative purpose in exempting okolehao was "to

tory relating to the exemption, the state Supreme Court found that the state's legislative purpose was " 'to help' in stimulating 'the local fruit wine industry' " by relieving the Hawaiian wine industry of a tax burden imposed on wines produced outside the state. App. at A-13.

The relevant Commerce Clause rules are equally clear. While the Commerce Clause is primarily a broad grant of power to Congress to regulate interstate and foreign commerce, it is well established that the Clause also acts directly to limit the powers of the states. As this Court has noted, the Commerce Clause " 'by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977), *quoting Freeman v. Hewit*, 329 U.S. 249, 252 (1946).[3] For this reason, this Court has consistently held that taxes that discriminate against out-of-state goods or services are invalid under the Commerce Clause.[4]

'encourage and promote the establishment of a new industry.' " App. at A-13. In 1981, the legislature created a further exemption for "[r]um manufactured in [Hawaii] for the period May 17, 1981 to June 30, 1986." Hawaii Rev. Stat. § 244-4(8) (Supp. 1982). That exemption for Hawaiian rum is still in effect.

[3] *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977) (the Commerce Clause has a "free trade purpose"); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States").

[4] *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (security transfer tax); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939) (cement inspection fee); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113 (1908) (property tax); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (meat inspection fee); *Tiernan v. Rinker*, 102 U.S. 123 (1880) (liquor tax); *Webber v. Virginia*, 103 U.S. 344 (1881) (license tax); *Welton v. Missouri*, 91 U.S. 275 (1876) (license tax).

The decision of the Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), provides a recent example of the application of this principle. In that case New York had imposed a tax on transfers of certain securities. It had, however, established a lower rate of tax for transfers where the sale of securities in question took place on an exchange located within New York State.[5] The legislative purpose in creating the discrimination was to attract out-of-state sales to local exchanges. 429 U.S. at 320 n.3, 323-34, 327. The Supreme Court held that the tax unconstitutionally discriminated against services performed outside the state. The Court noted that prior decisions of the Court had established beyond any doubt that

> "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' . . . [This] prohibition . . . follows inexorably from the basic purpose of the [Commerce] Clause. Permitting the individual States to enact [such] laws . . . 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 429 U.S. at 329 (citations omitted).

The Court therefore found the tax unconstitutional because the New York statute, on its face, imposed a higher rate of tax on transfers simply because the underlying sales were effected outside the state. Moreover, the Court found that the state legislature's intent in adopting the tax was "wholly inconsistent with the free trade purpose of the Commerce Clause." 429 U.S. at 336.

The Court's decision in the *Boston Stock Exchange* case rested in part on a venerable precedent factually indis-

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[5] Specifically, the New York law provided that nonresidents of New York received a 50-percent reduction in the rate of tax if the transaction involved an in-state sale. The statute also imposed a ceiling on the total tax liability of any taxpayer (resident or nonresident) for a single transaction when it involved a sale within New York. 429 U.S. at 324-25.

tinguishable from the current case. In *Guy v. Baltimore*, 100 U.S. 434 (1880), Baltimore had imposed a tax on goods landed at the city's docks. Maryland products were excluded from taxation. 100 U.S. at 440-41. The Court found the tax unconstitutional on its face. By its terms, the tax imposed a burden on out-of-state goods to which Maryland products were not subject, thus violating the established rule that "no State can . . . impose upon the products of other States . . . more onerous . . . taxes than it imposes upon the like products of its own territory." 100 U.S. at 439. In so holding, the Court rejected the same statutory purpose now cited by the Hawaii Supreme Court. The Court held that under the Commerce Clause the states cannot "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." 100 U.S. at 443. Were states allowed to impose discriminatory taxes such as Baltimore's, "the trade and business of the country [would be placed] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." The Commerce Clause clearly was intended to prevent this result. 100 U.S. at 442. *Welton v. Missouri*, 91 U.S. 275 (1876), another decision relied upon by the *Boston Stock Exchange* Court, similarly invalidated a license tax on peddlers selling out-of-state goods on the ground that the tax discriminated against goods by "reason of [their] foreign origin." 91 U.S. at 282.

Cases like *Boston Stock Exchange*, *Guy*, and *Welton* provide clear examples of the application of the "no-discrimination" rule. Where a tax discriminates on its face, and the state does not impose any comparable tax burden on in-state goods, the tax is unconstitutional.[6]

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[6] Situations sometimes arise where tax statutes, discriminatory on their face, turn out not to be discriminatory in fact because other statutes impose the same tax burden on in-state products. Such taxes may be valid. *E.g.*, *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). Conversely, there are cases in which state laws do not, on

No further factual inquiry into the effect of the discriminatory tax is necessary. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 330-32.[7]

The Hawaii Supreme Court wholly ignored this line of authority. Instead, it sought to defend the statute on the ground that it did not discriminate against out-of-state *residents*. Resident and nonresident corporations, said the court, were equally subject to taxation if they sold non-Hawaiian wine. App. at A-24 to 25, A-35 n.12. At the same time, they were equally "free to engage in the wholesaling of . . . [Hawaiian products] if [they had] reason to believe this [would] relieve [their] tax burden" in Hawaii. App. at A-25. Under these circumstances, the court "detect[ed] no discrimination against . . . interstate commerce" in violation of the Commerce Clause. *Id.*

In focusing on the question of *residence*, the Hawaii court missed the point. One of the principal purposes of

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their face, appear to be discriminatory but where (as applied) the laws have a discriminatory effect. Such laws are, of course, unconstitutional. *E.g., Nippert v. City of Richmond*, 327 U.S. 416, 431-32 (1946).

[7] The Court in *Boston Stock Exchange* held, without surveying the actual effects of the tax on out-of-state exchanges, that the New York stock transfer tax was unconstitutional on its face because it "foreclose[d] tax-neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to . . . sister States." 429 U.S. at 331. The New York Court of Appeals in the *Boston Stock Exchange* case had found that the tax had *no* "practical" effect on out-of-state sales by New York residents because " 'it [was] more than likely . . . that [a] sale [by a resident] would be made on a New York exchange in any event.' " 429 U.S. at 333. But the Supreme Court, relying on the discriminatory language of the statute alone, discarded the New York court's finding. In the Court's words, the statutory tax burden "cannot be deemed to have no practical effect on interstate commerce." 429 U.S. at 334. *See also Maryland v. Louisiana*, 451 U.S. 725, 756-57 (1981) (holding that a complicated scheme of taxes imposed on natural gas passing through Louisiana was unconstitutional because, "[o]n its face" and by its "obvious economic effect," it unconstitutionally discriminated against out-of-state gas users).

the Commerce Clause was to protect out-of-state *goods* against discriminatory state taxes, even where the tax falls equally on in-state and out-of-state sellers. Under the Articles of Confederation, discriminatory state taxes posed a serious threat to the nation's economy, as the states waged commercial war against one another by imposing duties on imports from other states.[8] The Commerce Clause was intended to end the trade wars, establish a national market for goods, and guarantee that states could not advance their own commercial interests by using discriminatory taxation to restrict the sale of out-of-state goods within their borders.[9] Accordingly, this Court has consistently struck down state taxes that discriminate against out-of-state goods, even where resident and nonresident taxpayers have received equal treatment. For example, in *Welton v. Missouri*, the Court invalidated the Missouri license tax despite its equal application to all peddlers of out-of-state goods, because the Commerce Clause protects goods "from *any* [discrimina-

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[8] *See* J. Fiske, *The Critical Period of American History 1783-1789* 148-52 (1897) (states waged "commercial war" through duties on out-of-state goods); J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 132-33 (1978) (retaliatory state taxation under Articles of Confederation); C. Warren, *The Making of the Constitution* 567 (1929) (states imposed duties on goods from other states).

[9] *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (Commerce Clause intended to "avoid the [nation's] tendencies toward economic Balkanization"); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535, 538 (1949) (Commerce Clause protects interstate movement of goods); *Webber v. Virginia*, 103 U.S. 344, 350 (1881) (Framers intended Commerce Clause to prevent use of discriminatory taxes "to exclude . . . foreign article[s] and prevent competition with . . . home product[s]").

See also Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (Commerce Clause forbids a state's "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

tory] burdens imposed by reason of . . . foreign origin." 91 U.S. at 282 (emphasis added). Similarly, in *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113 (1908), the Court struck down a Tennessee property tax favoring in-state goods, even though it applied to Tennessee and non-Tennessee property owners alike.[10] For the *Darnell* Court, the sole issue was whether the state "discriminate[d] by taxation . . . against property brought from other States." 208 U.S. at 121.[11]

The *per se* rule of illegality for discriminatory state taxes, which this Court has consistently affirmed over the past 100 years, serves the practical needs of both the states and private litigants. State taxation of interstate commerce is a frequent source of litigation, and these cases often raise complex issues of fact. Clear, easily administrable rules are necessary if state legislatures and courts are to comply with Commerce Clause principles without repeated litigation before this Court.[12]

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[10] Indeed, in *Darnell*, the tax was challenged by a Tennessee corporation domiciled within the state. 208 U.S. at 116.

[11] *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (state transfer tax unconstitutional even though it imposed no higher tax on nonresidents of New York than on New York residents).

The Hawaii tax statute is, of course, no less discriminatory because it takes the form of an exemption for in-state goods from a tax imposed on all other goods. In *Darnell*, the Court struck down, as discriminatory, a Tennessee property tax that exempted a class of in-state goods from a tax imposed on goods produced outside the state.

[12] Because of limitations on the jurisdiction of the lower federal courts, this Court will often be the only federal court open to parties seeking to challenge the unconstitutionality of state tax laws. Under the Tax Injunction Act, 28 U.S.C. § 1341 (1976), the federal district courts may not "enjoin, suspend or restrain" the assessment of any state tax where a "plain, speedy and efficient remedy" is available through the state courts. The Supreme Court has interpreted "plain, speedy and efficient" broadly. Thus, where a state provides a reasonable procedure for suing to recover a tax

The present rule of *per se* unconstitutionality is such a rule, minimizing confusion and controversy while simultaneously offering maximum protection for the values reflected in the Commerce Clause.

Under the *per se* rule, the applicable legal principles are easy to define and simple to enforce. Moreover, they leave the states free to use many measures to promote their local economies or advance legitimate regulatory policies.[13] The states simply may not use discriminatory taxation to serve these goals. To hold otherwise would be to undercut a fundamental purpose of the Commerce Clause.

Notwithstanding the free-trade principles incorporated in the Commerce Clause, an increasing number of states have disregarded the *per se* rule and are enacting discriminatory tax legislation designed to favor local producers of alcoholic beverages. At latest count, at least 30 states have enacted laws that impose higher taxes on out-of-state alcoholic beverages than on such beverages produced within the state.[14] This interstate rivalry is precisely what the Commerce Clause was designed to pro-

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payment, a taxpayer ordinarily will be required to pay the tax and sue the state for a refund in the state courts, with a right of ultimate appeal to the U.S. Supreme Court. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

[13] Thus, for example, states may constitutionally employ subsidies to promote local industries that serve the state's environmental needs. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (subsidy program for scrap processors). They may also seek to alleviate unemployment by favoring local residents in awarding government contracts. *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983) (city order requiring construction work funded by the city to be performed by work forces consisting of at least 50 percent local residents).

[14] *See, e.g.*, Ga. Code Ann. §§ 3-4-60, 3-6-50 (1982 & Supp. 1982) (wine and distilled spirits); Va. Code §§ 4-22.1, 4-25.1 (1983) (wine). Some of the statutes involve a state's attempt to retaliate against discriminatory taxes imposed on its products by other states. *See, e.g.*, Del. Code Ann. tit. 4, § 728 (1975) (beer).

hibit and what a *per se* rule of unconstitutionality must prevent. A reaffirmation of the rule in the current case will serve a significant constitutional purpose.

II. The Twenty-first Amendment to the Constitution Does Not Validate Hawaii's Tax.

If this case involved milk or fruit juice, our analysis would be at an end. However, since this case involves a tax on liquor we must consider what, if any, effect the Twenty-first Amendment has on the result. We conclude that it has none.

The Twenty-first Amendment to the Constitution, adopted in 1933, repealed Prohibition.[15] Section 2 of that Amendment reserved to the states certain powers to regulate liquor; thus, it provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This Court has made clear, however, that Section 2 does not repeal any other provision of the Constitution. State laws regulating the importation, sale or use of liquor must be reconciled with constitutional provisions such as the Commerce Clause, and the Court has developed techniques for accommodating the relevant constitutional interests.

As we show in Part A below, the process of accommodation spelled out in the decisions of this Court requires, as a first step, an identification of the interest the state's enactment is designed to serve. To the extent that the Twenty-first Amendment was designed to provide constitutional validation for such a state interest, the second step in the process—a balancing of the competing constitutional interests—comes into play. Under this

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[15] Section 1 provides, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1.

method of analysis, it is clear that the interest Hawaii has identified in this case—promotion of local industry—has no Twenty-first Amendment significance. Accordingly, the substantial constitutional interest in free trade among the states is decisive, and the Twenty-first Amendment cannot save the Hawaii tax.

As we show in Part B below, the history of state liquor regulation and litigation which culminated in adoption of the Twenty-first Amendment makes clear that Section 2 of that Amendment was intended to reserve to the states only the authority to enforce reasonable, nondiscriminatory laws aimed at counteracting the evils believed to be associated with liquor and the liquor trade. Whatever powers states may have to enact laws designed to promote temperance, Section 2 was not intended to permit states to do what Hawaii has done here—to adopt discriminatory taxes for the purpose of promoting the business interests of local liquor producers.

A. *Where State Liquor Laws Promote Interests Inconsistent with Other Constitutional Provisions, Including the Commerce Clause, a Balancing Analysis Is Required.*

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), established the analytical framework applicable to this case. *Idlewild* involved application of a state liquor licensing law to a retail liquor business located at John F. Kennedy Airport in New York City. The retailer purchased the liquor outside the state under the supervision of the Federal Bureau of Customs, imported and transported it to the airport, sold it to departing international passengers, and placed it immediately on the aircraft for ultimate use in a foreign country. 377 U.S. at 325. The New York State Liquor Authority attempted to shut down Idlewild's business, claiming that it was operating in violation of the state's liquor li-

censing law. That law required retail liquor outlets to have a street-level entrance on a public thoroughfare, and since Idlewild could not comply with this requirement, it could not obtain a license. 377 U.S. at 326. The Court acknowledged that if the commodity involved in the case were not liquor, "but grain or lumber, the Commerce Clause would clearly deprive New York" of the power to terminate the business. 377 U.S. at 329. Thus, the case presented squarely the issue of how to analyze a conflict between the Commerce Clause and a liquor regulation arguably validated by Section 2 of the Twenty-first Amendment.

After reviewing its earlier decisions, the Court concluded that the Twenty-first Amendment had not "operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned . . . ." 377 U.S. at 331-32. Indeed, such an interpretation would be "an absurd over-simplification." *Id.* Rather, the Court reasoned, "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* Thus, a balancing analysis, considering the interests involved in each specific case, was required.

In applying the balancing test to the facts of the *Idlewild* case, the Court first examined the state interest in the regulation. Since Idlewild's liquor was imported and sold in New York for ultimate use and delivery in a foreign country, the state had a legitimate interest in preventing the unlawful use or diversion of the liquor to potential users in New York. This interest clearly served the purposes of the Twenty-first Amendment. 377 U.S. at 333. The Court next considered whether application of the challenged statute furthered this interest and concluded that it did not since, "[a]s the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic

beverages within New York.' " 377 U.S. at 333-34. Under such circumstances, the Court concluded that the federal interest in the free flow of commerce—protected by the Commerce Clause—required that the state's attempt to regulate Idlewild be invalidated. 377 U.S. at 334.

Since 1964, this Court has repeatedly affirmed the applicability of this type of test to cases involving assertions that the Twenty-first Amendment authorized state regulations prohibited by other provisions of the Constitution. Thus, in *California v. LaRue*, 409 U.S. 109 (1972), the Court resolved an asserted conflict between the First Amendment and the state's right to regulate liquor by applying the *Idlewild* test. Four years later in *Craig v. Boren*, 429 U.S. 190 (1976), the Court similarly resolved a Fourteenth Amendment issue by applying the *Idlewild* analysis. And most recently, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court again affirmed the applicability of the test where Commerce Clause interests are involved.

The issue in *Midcal* was whether California's legislated system of wine wholesale price posting and resale price maintenance violated the Sherman Act and, if so, whether it was nonetheless a valid exercise of the state's power under the Twenty-first Amendment.[16] To resolve this issue, the Court engaged in a "pragmatic effort to harmonize [the] state and federal powers" involved in the case before it. 445 U.S. at 109. The state's interests in the resale price maintenance system, identified by the California court, were the promotion of temperance and of orderly market conditions, *i.e.*, protection of small liquor dealers from predatory pricing policies of large retailers. 445 U.S. at 112. The California Court of Appeals had found that it was unlikely that those in-

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[16] The Court first concluded that California's pricing statute was not protected by the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and thus violated the Sherman Act.

terests were in fact served by the challenged price maintenance system. 445 U.S. at 112-14.[17] Accordingly, the California court concluded that the statute must give way to the Commerce Clause because a legitimate state interest was not present and there was a strong national policy in favor of competition. The Supreme Court affirmed, 445 U.S. at 114, leaving open the question "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." 445 U.S. at 113-14.

In all of these cases, the Court considered and rejected the reasoning which underlay several older decisions of this Court suggesting that the Twenty-first Amendment conferred power on the states to enact any liquor regulation, regardless of its purpose or discriminatory effect, and regardless of other constitutional provisions. *See Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). Thus, in *Craig v. Boren*, 429 U.S. at 207, the Court explicitly rejected the suggestion in *Young's Market* that the Twenty-first Amendment repealed the Equal Protection Clause, stating:

> "[T]he Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."

Accord California v. LaRue, 409 U.S. at 115 (rejecting the suggestion that "the Twenty-first Amendment super-

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[17] Studies cited by the lower court had indicated that there was little correlation between resale price maintenance and temperance, and that fair trade laws were not necessary to the economic survival of small retailers. 445 U.S. at 112-13.

sedes all other provisions of the United States Constitution in the area of liquor regulations"). And, of course, *Idlewild* and *Midcal* both held that a balancing analysis was appropriate in cases where state liquor laws are challenged under the Commerce Clause.[18] The *Midcal* Court put the early cases in perspective:

> "The Court upheld the challenged state authority in each [of those early cases], largely on the basis of the States' special power over the 'importation and transportation' of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 'freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.'" 445 U.S. at 108.[19]

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[18] *See also Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966).

[19] These early cases have, in our view, been effectively overruled. If they had any residual vitality, it would be limited to the precise facts of those cases. *Young's Market* involved the question whether a $500 license fee imposed on importers of liquor was permissible. The Court upheld the license fee, noting that it was not in fact discriminatory since a license fee of $750 was imposed on domestic manufacturers of liquor. This case, on the other hand, presents precisely the issue of a discriminatory tax on out-of-state producers. In addition, and unlike this case, the Court implied in *Young's Market* that the license fee was a legitimate exercise of the state's power to regulate liquor in the interest of public health and welfare. The Court said that "the exaction of a high license fee for [liquor] importation may . . . serve as an aid in policing the liquor traffic." 299 U.S. at 63.

The remaining cases are distinguishable in that they involved the actual exclusion of liquor in whole or in part from importation into the state. Thus, *Mahoney v. Joseph Triner Co.*, 304 U.S. 401 (1938), involved a regulation limiting the importation of liquor to brands registered with the U.S. Patent Office; *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939), involved a statute excluding beer manufactured in a state which discriminated against locally produced beer; and *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), involved the exclusion of liquor manufactured in states that discriminated against imported liquor. On the surface,

The test developed in the *Idlewild* and *Midcal* cases, discussed above, is a two-step process. The actual balancing of the state's interest against the constitutional limit on state power is the second part of the process. Before the balancing can begin, it is necessary to decide the extent to which the interest asserted by the state gains constitutional significance because of the existence of the Twenty-first Amendment.[20] Section 2 of the Amendment was designed to reconfirm the power of the states to enact appropriate laws to promote temperance and, in particular, to permit states to remain "dry" after the repeal of Prohibition, if they so wished.[21] No such interests were served by the regulation in *Idlewild*, and in *Midcal* the state regulations were found to serve no valid purpose at all. Thus, the Twenty-first Amendment did not add any weight to the state interest in the balancing analysis.

The result should be the same here. Since the state's interest in this case—promotion of local industry—has no Twenty-first Amendment significance, the federal interest in free trade embodied in the Commerce Clause and described in Part I of this brief should be controlling, and the tax must be invalidated.

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exclusions appear more likely to fall under the language of Section 2. However, the history of Section 2 shows that the powers being granted to the states, whatever they encompassed, specifically denied authority to levy discriminatory taxes. *See* Part B *infra*.

[20] In *Midcal*, because of the state court's finding that the statute served no asserted interest, the Commerce Clause interest easily prevailed. In the balance in *Idlewild*, the Court reached the same conclusion.

[21] *See Dugan v. Bridges*, 16 F. Supp. 694 (D.N.H. 1936); *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936). *See also* Part B *infra*.

B. *The Court's Balancing Test Reflects the Legislative History and Purposes of the Twenty-first Amendment.*

The history of the Twenty-first Amendment shows that Section 2 of the Amendment was intended to enable the states to enforce reasonable, nondiscriminatory laws to counteract evils believed to be associated with liquor and the liquor trade. Section 2 incorporated into the Constitution the provisions of two pre-Prohibition statutes. These statutes authorized states to regulate alcoholic beverages principally to enable them, if they chose, to exclude beverages from the state or to limit or control their use. The statutes also prohibited the states from using this regulatory power to promote local producers by discriminating against out-of-state producers.

The history of the Amendment is unequivocal in two respects. First, it shows—as this Court has held—that the states' power was not to be absolute, thus confirming the propriety of the balancing test employed by the Court to accommodate a conflict between a state interest asserted under the Amendment and other constitutional interests. Second, it shows that the scope of the regulatory power conferred did not, in any event, encompass authority to promote a local liquor industry by discriminating between in-state and out-of-state producers. The history thus confirms that a state can assert no Twenty-first Amendment interest when it enacts a discriminatory tax, like Hawaii's, designed to promote a local industry.

In the nineteenth century, this Court had held that states could prohibit and regulate the sale and distribution of liquor brought within their territory as a proper exercise of their police power. *See License Cases*, 46 U.S. (5 How.) 504 (1847).[22] The *License Cases*, however,

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[22] Thus Justice Taney said:

"And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the consti-

were overruled in *Leisy v. Hardin*, 135 U.S. 100 (1890). There the Court struck down an Iowa law prohibiting the manufacture or sale of liquor insofar as it applied to the sale by the importer in the original package or keg. As a result of *Leisy*, the interstate mail order liquor business flourished and dry states were thought to be "powerless to protect themselves against the importation of liquor into the States."[23]

Congress responded four months after *Leisy* was decided by enacting the Wilson Act,[24] which authorized states to enact reasonable laws in the exercise of their valid police powers to regulate imported as well as domestically produced liquor "upon arrival" in the state.[25]

> tution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." 46 U.S. at 577.

Accord Mugler v. Kansas, 123 U.S. 623 (1887) (state could constitutionally prohibit the manufacture and sale of intoxicating liquors). These early cases nevertheless held that state regulations that stopped short of prohibition could not discriminate without a logical basis between citizens in the same class or against goods produced outside the state. Such discrimination placed an impermissible burden on interstate commerce in violation of the Commerce Clause. *See Walling v. Michigan*, 116 U.S. 446 (1886); *Tiernan v. Rinker*, 102 U.S. 123 (1880).

[23] 76 Cong. Rec. 4170-71 (1933) (remarks of Sen. Borah, reviewing the history of liquor regulation during debate on Section 2 of the Twenty-first Amendment).

[24] As Senator Wilson explained, "[the] bill in its amended form is a response to the suggestion contained in [the *Leisy* case] . . . . If a State shall desire prohibition it can adopt it and exercise it and enforce it under the provisions of this bill." 21 Cong. Rec. 4954 (1890).

[25] The Wilson Act provides in part:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State . . . or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids

The Act specifically forbade discriminatory treatment of liquor produced outside the state, providing that a state could subject "intoxicating liquor" that had arrived within its territory to its laws only "to the same extent and in the same manner as though such . . . liquors had been produced in such State . . . ." This Court held in *Scott v. Donald*, 165 U.S. 58 (1897), that discriminatory treatment was not authorized by the Act and that a statute authorizing such treatment would be void since it would impermissibly burden interstate commerce:

> "It is sufficient for the present cases to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States." 165 U.S. at 101.[26]

Subsequent Supreme Court decisions, however, interpreted the "upon arrival" provision of the Wilson Act to mean that the state's regulatory powers under the Act could not take effect until the liquor was delivered to the ultimate consignee. Thus, until the interstate transaction had been consummated by delivery to the consignee, the state was powerless to interfere with it, even in a nondiscriminatory manner.[27] As a result, dry states once

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or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act of August 8, 1890, ch. 728, 26 Stat. 313, 27 U.S.C. § 121 (1976).

[26] *Accord Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910); *Reymann Brewing Co. v. Brister*, 179 U.S. 445 (1900); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 444 (1898).

[27] *See Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912); *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907); *Heyman v. Southern Ry.*, 203 U.S. 270 (1906); *American Express Co. v. Iowa*, 196 U.S. 133 (1905); *Rhodes v. Iowa*, 170 U.S. 412 (1898).

again found themselves unable to prohibit their citizens from receiving liquor acquired from mail order dealers in wet states.

In 1913, the Webb-Kenyon Act[28] was passed to close this loophole.[29] Like the Wilson Act, the Webb-Kenyon

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[28] The Webb-Kenyon Act provides in part:

> "The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited." Ch. 90, 37 Stat. 699 (1913), 27 U.S.C. § 122 (1976), *re-enacted*, ch. 740, § 202(b), 49 Stat. 877 (1935).

[29] The purpose of the Webb-Kenyon Act, clear from the legislative history, was simply to remedy the "upon arrival" loophole created by this Court's interpretation of the provision of the Wilson Act. The Webb-Kenyon Act, however, was not intended to change any other aspect of the Wilson Act—including its nondiscrimination provisions. Thus, Senator Kenyon, a sponsor of the bill, said:

> "Every State in which the traffic in liquors has been prohibited by law is deluged with whiskey sent in by people from other States under the shelter of the interestate commerce law. . . . [The Webb-Kenyon Act's] purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders. . . . Where a State has determined that intoxicating liquors shall not be manufactured or sold within its borders, is it not manifest that the citizens of other States should not be granted greater privileges in that State than its own citizenship enjoy?" 49 Cong. Rec. at 761, 707 (1912).

The Supreme Court, upholding the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917), similarly held that the Act was simply an extension of the Wilson Act:

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the

Act was interpreted to authorize states to interfere with interstate commerce only with reasonable laws enacted in the exercise of their valid police powers. Laws that discriminated against out-of-state liquor producers were not authorized by the Webb-Kenyon Act and were thus invalid under the Commerce Clause.[30] As the court said in *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402 (1916):

> "[W]hile [the Webb-Kenyon Act] does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraw from them the protection of interstate commerce, it evidently contemplated the violation of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations. . . ." 106 S.C. at 108-09, 90 S.E. at 404.[31]

Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws for naught." 242 U.S. at 323-24. *See also* 242 U.S. at 330.

[30] *See Evansville Brewing Ass'n v. Excise Comm'n*, 225 F. 204 (D. Ala. 1915); *Premier-Pabst Sales Co. v. McNutt*, 17 F. Supp. 708 (S.D. Ind. 1935); *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652 (1915); *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S.W. 908 (1913); *Monumental Brewing Co. v. Whitlock*, 111 S.C. 198, 97 S.E. 56 (1918); *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402 (1916).

[31] The court in *Evansville Brewing Ass'n v. Excise Comm'n*, 225 F. 204, 209 (D. Ala. 1915), similarly stated:

> "[S]ince the passage of the Wilson Law and the Webb-Kenyon Law, the state of Alabama has the power to exact a license from the Alabama seller of beer made in another state and shipped into this state, if the license is for police purposes and works no unjust discrimination against the foreign made beer. . . .
>
> The exaction of an additional license of the Alabama wholesale dealer for the privilege of selling foreign made beer, when

In 1919, the Eighteenth Amendment[32] was adopted, mooting for a time the debate over the scope of state power to regulate alcoholic beverages. But introduction of the proposal to repeal Prohibition sparked the controversy once again. Supporters of the dry states urged that the Webb-Kenyon Act be incorporated into the Twenty-first Amendment, fearing that the Act might otherwise be overruled in the future by the Supreme Court or modified or even repealed by Congress, leaving the dry states unprotected.[33] Thus, Senator Blaine reported the view of the Senate Judiciary Committee to the Senate:

> "In the case of Clark against Maryland Railway Co. there was a divided opinion [with respect to the constitutionality of the Webb-Kenyon Act]. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." 76 Cong. Rec. 4141 (1933).

Senator Bingham similarly noted that Section 2 was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the

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a like license is not exacted for the sale of beer of domestic manufacture, is an evident discrimination against the seller of the foreign made beer."

[32] The Eighteenth Amendment provides in part:

"[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. Const. amend. XVIII, § 1.

[33] The Wilson and Webb-Kenyon Acts had been upheld by divided courts. *See Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1891).

right of the dry states to have Federal protection against importation of liquor." 76 Cong. Rec. 4228 (1933).[34]

During the years immediately after its enactment, Section 2 of the Twenty-first Amendment was found by most lower courts that considered the issue to be little more than an incorporation into the Constitution of the Webb-Kenyon Act.[35] Section 2 was therefore found only to authorize states to enforce reasonable laws adopted in the exercise of their police powers to counteract the evils of liquor and the liquor trade—not to authorize states

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[34] *Accord* remarks of Senator Borah, calling Section 2 "vital" to protect the "dry states":

> "[I]t has been said that the Webb-Kenyon Act is a sufficient protection to the dry states. The Webb-Kenyon Act was sustained by the Supreme Court . . . by a divided court. . . . President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. . . . Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry states over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might be held unconstitutional upon re-presentation of it. Secondly we are asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. . . . I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." 76 Cong. Rec. 4170, 4172 (1933).

See also id. at 4140-41 (remarks of Sen. Blaine); *id.* at 4171 (remarks of Sen. Wagner); *id.* at 4172 (remarks of Sen. Lewis).

[35] *See Dugan v. Bridges*, 16 F. Supp. 694 (D.N.H. 1936); *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936); *Young's Market Co. v. State Bd. of Equalization*, 12 F. Supp. 140 (S.D. Cal. 1935), *rev'd*, 299 U.S. 59 (1936); *Premier-Pabst Sales Co. v. State Bd. of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1935); *Joseph Triner Corp. v. Arundel*, 11 F. Supp. 145 (D. Minn. 1935). *But see Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970 (E.D. Pa. 1935), *aff'd on other grounds*, 298 U.S. 226 (1936) (Supreme Court affirming for lack of standing, without reaching the constitutional issue).

to adopt discriminatory regulations or measures having no legitimate relation to the purposes of the Twenty-first Amendment.[36]

This history of the Twenty-first Amendment reinforces the appropriateness of the balancing approach the Court has developed in the *Idlewild/Midcal* line of cases. As these early court decisions recognized, the Twenty-first Amendment can support the validity of state statutes regulating liquor only to the extent that the state is attempting to serve the purposes underlying that Amendment. Whatever powers the states may have in this area, the Twenty-first Amendment was not added to the Constitution to permit the states to promote local producers of alcoholic beverages at the expense of producers located elsewhere. Statutes designed to serve that purpose

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[36] Discriminatory state liquor laws were struck down generally on Commerce Clause or equal protection grounds, or both. *See* cases cited *supra* note 35.

In *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936), a three judge district court held that a Washington state requirement that nonresident—but not resident—beer producers be licensed violated the Commerce Clause and was not saved by the Twenty-first Amendment, stating:

> "While it may be conceded that the intent of the Wilson Act, . . . the Webb-Kenyon Act, . . . and the Twenty-First Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another. . . . It follows that [the Washington statute] is void . . . because it violates the commerce clause . . . ." 16 F. Supp. at 39-40.

And *see Dugan v. Bridges*, 16 F. Supp. 694 (D.N.H. 1936), where a three judge district court upheld a nondiscriminatory New Hampshire licensing fee but pointed out that a regulation unrelated to the state's legitimate interests—such as a tax on imported liquor to promote the domestic liquor industry—would be invalid. 16 F. Supp. at 707.

must therefore stand or fall without regard to the Twenty-first Amendment. Since, as we have shown, the Twenty-first Amendment does not save the Hawaii statute, that statute must fall under the Commerce Clause.[37]

CONCLUSION

The Hawaii tax discriminates against liquor produced out-of-state for the sole purpose of promoting the local liquor industry. As such, it is invalid on its face under the Commerce Clause. Moreover, a tax whose purpose is pure economic protectionism can derive no constitutional justification from the Twenty-first Amendment. For these reasons, the judgment of the Hawaii Supreme Court must be reversed.

Respectfully submitted,

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[37] Since the statute plainly violates the Commerce Clause and is not saved by the Twenty-first Amendment, the Court need not reach the issue whether the tax also violates the Import-Export Clause. In any event, in view of the Court's treatment of discriminatory taxes of this kind, there is no basis for reaching a result under the Import-Export Clause different from that under the Commerce Clause. *See Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

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No. 82-1565-ASX
Status: GRANTED

Title: Bacchus Imports, Ltd., et al., Appellants
v.
George Freitas, Director of Taxation of the State of Hawaii, et al.

Docketed:
March 15, 1983

Court: Supreme Court of Hawaii

Counsel for appellant: Haley,Allan S.

Counsel for appellee: Dexter,William D., Bigelow,Bruce C.

Entry	Date	Note	Proceedings and Orders
1	Mar 15 1983	G	Statement as to jurisdiction filed.
2	Mar 15 1983		Appendix of appellant Bacchus Imports, et al. filed.
4	Apr 11 1983		Order extending time to file response to jurisdictional statement until May 7, 1983.
5	May 9 1983		Motion of appellee to dismiss or affirm filed.
6	May 11 1983		DISTRIBUTED. May 26, 1983
8	May 31 1983		REDISTRIBUTED. June 2, 1983
10	Jun 6 1983		REDISTRIBUTED. June 9, 1983
12	Jun 13 1983		REDISTRIBUTED. June 16, 1983
13	Jun 20 1983		PROBABLE JURISDICTION NOTED.
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15	Jul 25 1983		Order extending time to file response to jurisdictional statement until August 18, 1983.
16	Aug 3 1983		Time for filing brief of appellee Foremost-McKesson, Inc in support of appellants extended to September 1, 1983.
18	Aug 3 1983		Order extending time to file response to jurisdictional statement until October 1, 1983.
19	Aug 11 1983		Order further extending time to file response to jurisdictional statement until September 1, 1983.
20	Aug 29 1983		Joint appendix filed.
21	Sep 1 1983		Brief amicus curiae of The Wine Institute filed.
22	Sep 1 1983		Brief amicus curiae of Distilled Spirits Council of the United States, Inc. filed.
23	Sep 1 1983		Brief of appellants Bacchus Imports, et al. filed.
24	Sep 1 1983		Brief of appellee Foremost McKesson, Inc. in support of petition filed.
25	Sep 19 1983		Record filed.
26	Sep 19 1983		Certified original record on appeal received.
27	Oct 3 1983		Order further extending time to file response to jurisdictional statement until November 10, 1983.
28	Nov 10 1973		Order further extending time to file response to jurisdictional statement until November 20, 1983.
29	Nov 21 1983		Brief amicus curiae of Multistate Tax Commission filed.
30	Nov 21 1983	D	Motion of appellee George Freitas, Director of Taxation of the State of Hawaii to dismiss the appeal or remand the case filed.
31	Nov 21 1983		Brief of appellee Freitas, Dir. of Taxation filed.
32	Nov 23 1983		SET FOR ARGUMENT. Wednesday, January 11, 1984. (4th case)
33	Dec 1 1983		CIRCULATED.
34	Dec 2 1983		Opposition of Bacchus Imports, et al. to motion of appellee Frietas, Dir. of Taxation to Dismiss or Remand filed.

No. 82-1565-ASX

Entry	Date	Note	Proceedings and Orders
35	Dec 5 1983		DISTRIBUTED. December 9, 1983. (Motion of appellee, George Freitas, to dismiss or remand).
36	Dec 12 1983		Motion of appellee George Freitas, Director of Taxation of the State of DENIED. Justice Brennan OUT.
37	Dec 12 1983		Letter of McKesson Corporation pursuant to Rule 10.4 filed.
38	Dec 12 1983		Letter of Paradise Beverages, Inc. pursuant to Rule 10.4 filed.
39	Dec 23 1983	X	Reply brief of appellants Bacchus Imports, et al. filed.
40	Jan 11 1984		ARGUED.